

1354
United States
1354
Circuit Court of Appeals
For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,
vs.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

FILED
JUL 25 1923
K. D. MONKTON
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United States
Circuit Court of Appeals
For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

Messrs. BOGLE, MERRITT & BOGLE, Attorneys
for Plaintiff in Error,

609-16 Central Building, Seattle, Washington.

E. I. JONES, Esq., Attorney for Plaintiff in Error,
609-16 Central Building, Seattle, Wash-
ington.

FRED C. BROWN, Esq., Attorney for Defendant
in Error,

201 Lyon Building, Seattle, Washington.

J. STANLEY TYRRELL, Esq., Attorney for De-
fendant in Error,

203 Lyon Building, Seattle, Washington.

[1*]

COPY.

In the Superior Court of the State of Washington
for King County.

7018.

No. 160,595.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

*Page-number appearing at foot of page of original certified Trans-
cript of Record.

Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That plaintiff and Anna J. Roman, during the times hereinafter mentioned, were and now are husband and wife; that plaintiff brings this action for and on behalf of himself and the community composed of himself and Anna J. Roman, his wife.

II.

That there has been *bron* as the issue of said marriage seven children, the oldest being a girl fourteen years of age, and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That deceased had no wife and children, and plaintiff and said Anna J. Roman, his parents, have been and now are residents of Seattle, King County, Washington, and for some time prior to and after the death of said Edgar Roman, deceased, plaintiff was dependent upon him for support.

IV.

That plaintiff for a number of years last past has been and now is physically incapacitated for labor and unable to support his said wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to plaintiff and his family for the necessities [2] of life and was at the time

of his death contributing to the support of the plaintiff and would have materially continued to support plaintiff during the rest of his natural life.

V.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12, which extends from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

VI.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South in a northerly direction and crossing said track No. 12 at a point approximately described as follows: Beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly

direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way across and over said track No. 12 without objection on the part of the railroad company for more than twenty years last past. That a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at [3] or near said path, nor was there, on the date hereinafter mentioned any sign notifying children, or the child of this plaintiff, to not go upon or across said track No. 12 at its intersection with said path.

VII.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VIII.

That at about 4:00 o'clock P. M. on said day the plaintiff's children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing

said track plaintiff's children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that the said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died. [4]

IX.

That by reason of the death of said Edgar Roman, plaintiff has been deprived of his support for the rest of his natural life, and has been damaged in the sum of Fifteen Thousand Dollars.

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, together with his costs herein.

FRED C. BROWN,

J. STANLEY TYRRELL,

Attorneys for Plaintiff.

201 Lyon Building,

Seattle, Washington. [5]

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says: That he is the plaintiff above named; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14th day of July, 1922:

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in County Clerk's Office, King County, Wash. Aug. 8, 1922. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1922. F. M. Harshberger, Clerk. [6]

COPY.

In the Superior Court of the State of Washington
in and for King County.

7019.

No. 160,596.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

**OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY**, a Corporation,
Defendant.

Complaint.

Comes now the plaintiff and for cause of action
alleges:

I.

That on the 10th day of July, 1922, this plaintiff
was duly and regularly appointed administrators
of the estate of Edgar Roman, deceased, and has
qualified as such; that the heirs at law of said
Edgar Roman are the plaintiff above named and
Annie J. Roman. That he brings this action for
and on behalf of said heirs.

II.

That plaintiff and Anna J. Roman during the
times hereinafter mentioned were and now are hus-
band and wife; that there has been born as the issue
of said marriage seven children, the oldest being a
girl fourteen years of age, and one of said children

was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12, which extends from Argo [7] Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

IV.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: Beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said

track has been continuously and notoriously used by the public as a right of way over and across said track No. 12, without objection on the part of the railroad company for more than twenty years last past. That a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near the path, nor was there, on the date hereinafter mentioned, any sign notifying children, or the child of this plaintiff, to not go upon or across said track No. 12 at its intersection with said path.

V.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VI.

That at about 4:00 o'clock P. M. on the said day, the plaintiff's children Edgar and Charles, at the intersection of said [8] path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said track plaintiff's

children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars.

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,
J. STANLEY TYRRELL,

Attorneys for Plaintiff.

201 Lyon Building,
Seattle, Washington. [9]

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says: That he is the administrator of the estate of Edgar Roman, deceased, and plaintiff above named; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14 day of July, 1922.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in County Clerk's Office, King County, Wash. Aug. 8, 1922. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 29, 1922. F. M. Harshberger, Clerk.

[10]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Demurrer.

Comes now the defendant in the above-entitled action, and demurs to the complaint filed herein on the ground that it appears upon the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

BOGLE, MERRITT & BOGLE,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 16, 1922. F. M. Harshberger, Clerk. [11]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Demurrer.

Comes now the defendant in the above-entitled
action, and demurs to the complaint filed herein on
the ground that it appears upon the face of said
complaint that the same does not state facts suf-
ficient to constitute a cause of action.

BOGLE, MERRITT & BOGLE,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Sep. 16, 1922. F. M. Harshberger,
Clerk. [12]

United States District Court, Western District of
Washington, Northern Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON R. R. & N. CO.,

Defendant.

Hearing on Demurrer.

Now, on this 16th day of October, 1922, this cause comes on for hearing on demurrer, which is argued by respective counsel and same is overruled.

Journal #10, page 321. [13]

United States District Court, Western District of
Washington, Northern Division.

No. 7019.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON R. R. & N. CO.,

Defendant.

Hearing on Demurrer.

Now, on this 16th day of October, 1922, this cause comes on for hearing on demurrer, which is argued by respective counsel and same is overruled.

Journal #10, page 321. [14]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant herein, Oregon-Wash-
ington Railroad & Navigation Company, a corpora-
tion, and for its answer to the complaint herein,
admits, denies and alleges as follows, to wit:

I.

It admits the allegations of paragraphs I, II and
V thereof.

II.

Answering the allegations of paragraph III
thereof, it admits that deceased had no wife and
children, and that plaintiff and said Anna J. Roman
are residents of Seattle, King County, Washington.
Except as herein expressly admitted, defendant
denies each and every allegation, matter and thing
contained in said paragraph.

III.

It denies any knowledge or information thereof
sufficient to form a belief as to any allegation, mat-

ter, statement of thing contained in paragraph IV thereof, and it therefore denies the same. [15]

IV.

Answering the allegations of paragraph VI thereof, it denies each and every allegation, matter and thing therein contained.

V.

Answering the allegations of paragraph VII thereof, defendant admits that on the afternoon of the 18th day of May, 1922, there were standing on said track No. 12 a number of cars. Except as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

VI.

Answering the allegations of paragraph VIII thereof, defendant denies each and every allegation, matter and thing therein contained.

VII.

Answering the allegations of paragraph IX thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries, is not a crossing,

public or otherwise, neither has any right of way to the public or to the said Edgar Roman [16] ever been acquired over or upon said track No. 12 in any manner whatsoever; that said Edgar Roman at the time and place mentioned and referred to in said complaint, was a trespasser upon the said track No. 12, which was situated in the switch-yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and proximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take nothing in his complaint, and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath, says: That he is the agent and attorney for the Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action; that he is authorized to make this verification in its behalf; that he has read the foregoing Answer,

Answer.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and for its answer to the complaint herein, admits, denies and alleges as follows, to wit:

I.

It denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing contained in paragraph I thereof, and therefore denies the same.

II.

It admits the allegations of paragraph II and III thereof.

III.

It denies each and every allegation, matter and thing contained in paragraph IV thereof.

IV.

Answering the allegations of paragraph V thereof, it admits that on the afternoon of the 18th day of May, 1922, there were standing on said track No. 12 a number of railway cars. Except [19] as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

V.

It denies each and every allegation, matter and thing contained in paragraph VI thereof.

VI.

Answering the allegations of paragraph VII

thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that the plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant herein, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries is not a crossing, public or otherwise, neither has any right of way to the public or to the said Edgar Roman ever been acquired over or upon said track No. 12 in any manner whatsoever; that said Edgar Roman at the time and place mentioned and referred to in said complaint was a trespasser upon the said track No. 12, which was situated in the switch yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and proximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take [20] nothing in his complaint,

and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE.

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath, says: that he is the agent and attorney for the Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action, and is authorized to make this verification in its behalf; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 23d day of October, 1922.

[Notarial Seal] E. I. JONES,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 17, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff and replies to the affirmative defense contained in defendant's answer as follows:

I.

That he denies said affirmative defense and each and every allegation therein contained.

WHEREFORE having fully replied to said answer, this plaintiff prays for the same relief as demanded in the complaint.

J. STANLEY TYRRELL and
FRED C. BROWN,

Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath, deposes and says, that he is the plaintiff in the above-entitled action; that he has read the forego-

ing reply, knows the contents thereof, and believes the same to be true.

JAMES ROMAN.

Subscribed to and sworn to before me this 30 day of October, 1922.

FRED C. BROWN,

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within reply recd. this 1st day of Nov., 1922.

BOGLE, MERRITT & BOGLE,

Attorney for Dft. [22]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Reply.

Comes now the above-named plaintiff and replies to the affirmative defense contained in defendant's answer as follows:

I.

That he denies said affirmative defense and each and every allegation therein contained.

WHEREFORE having fully replied to said answer, this plaintiff prays for the same relief as demanded in the complaint.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

JAMES ROMAN.

Subscribed and sworn to before me this 30th day of October, 1922.

Notary Public in and for the State of Washington, Residing at Seattle. [24]

Copy of within reply recd. this 1st day of Nov., 1922.

BOGLE, MERRITT & BOGLE,
Attorneys for Deft.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 1, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the Superior Court of the State of Washington
in and for King County.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corpora-
tion,

Defendant.

Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That on the 10th day of July, 1922, this plaintiff was duly and regularly appointed administrator of the estate of Edgar Roman, deceased, and has qualified as such; that the heir at law of the said Edgar Roman is the plaintiff above named and Anna J. Roman; that he brings this action for and on behalf of said heirs.

II.

That plaintiff and Anna J. Roman during the times hereinafter mentioned were and now are husband and wife; that there has been born as the issue of said marriage seven children, the eldest being a girl of fourteen years of age, and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That plaintiff for a number of years last past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to said plaintiff for the necessities of life and was at the time of his death contributing to the support of plaintiff and would have materially continued to support plaintiff during the rest of his natural life. [26]

IV.

That the Oregon-Washington Railroad and Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which extends from Argo Station in a westerly direction some three thousand feet; that

said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said tract No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way over and across said track No. 12, without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned, any sign, notifying children, or the child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path. [27]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and

commencing about four feet east of said path and extending eastward about 2800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiff's children Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said track plaintiff's children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant

corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars. [28]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,

STANLEY J. TYRELL,

Attorneys for Plaintiff.

201 Lyon Building,
Seattle, Washington.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is the administrator of the estate of Edgar Roman, deceased, and plaintiff above named; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14th day of December, 1922.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

In the Superior Court of the State of Washington
in and for King County.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
tion,

Defendant.

Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That plaintiffs above named during the times hereinafter mentioned were and now are husband and wife; that there has been born as the issue of said marriage seven children, the eldest being a

girl fourteen years of age and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

II.

That deceased had no wife and children and plaintiffs, his parents, during the times hereinafter mentioned were and now are residents of the United States of America, residing at Seattle, King County, Washington, and for some time prior to and after the death of said Edgar Roman, deceased, plaintiffs were dependent upon him for support.

III.

That James Roman as aforesaid for a number of years last past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to said plaintiffs for the necessities of life and was at the time of his death contributing to the support of plaintiffs and would have materially continued to support plaintiffs [30] during the rest of their natural lives.

IV.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, run-

ning in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which extends from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a north westerly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way over and across said track No. 12 without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned, any sign, notifying children, or the

child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path.
[31]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiffs' children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said track plaintiffs' children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward

and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligence and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars. [32]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,
STANLEY TYRRELL,
Attorneys for Plaintiff.

201 Lyon Building,
Seattle, Washington.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is one of the plaintiffs in the above-entitled action, that he has read the fore-

going amended complaint, knows the contents thereof, and believes the same to be true.

JAMES E. ROMAN.

Subscribed and sworn to before me this 14th day of December, 1922.

FRED C. BROWN,

Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [33]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Second Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That plaintiffs above named during the times hereinafter mentioned were and now are husband and wife; that there has been born as the issue of said marriage seven children, the eldest being a girl fourteen years of age and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

II.

That deceased had no wife and children and plaintiffs, his parents, during the times hereinafter mentioned were and now are residents of the United States of America, residing at Seattle, King County, Washington, and for some time prior to and after the death of said Edgar Roman, deceased, plaintiffs were dependent upon him for support.

III.

That James Roman as aforesaid for a number of years last past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased, has contributed materially to said plaintiffs for the necessities of life and was at the time of his death contributing to the support of plaintiffs and would have materially continued to support plaintiffs [34] during the rest of their natural lives.

IV.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under

the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which extends from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously and notoriously used by the public as a right of way over and across said track No. 12 without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and

children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned any sign, notifying children, or the child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path. [35]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiffs' children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved; that before crossing said tract plaintiffs' children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while

crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that the said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of the death of said Edgar Roman, plaintiff has been deprived of his support for the rest of his natural life, and has been damaged in the sum of Fifteen Thousand Dollars (\$15,000.00). [36]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen Thousand Dollars, and for all his costs herein.

FRED C. BROWN,
J. STANLEY TYRRELL,
Attorneys for Plaintiff.

201 Lyon Bldg.,
Seattle, Wash.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is one of the plaintiffs above named; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

JAMES ROMAN.

Subscribed and sworn to before me this 5th day of January, 1923.

FRED C. BROWN,
Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 16, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [37]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corpora-
tion,

Defendant.

Second Amended Complaint.

Comes now the plaintiff and for cause of action alleges:

I.

That on the 10th day of July, 1922, this plaintiff was duly and regularly appointed administrator of the estate of Edgar Roman, deceased and has qualified as subject; that the heir at law of the said Edgar Roman is the plaintiff above named and Anna J. Roman; that he brings this action for and on behalf of said heirs.

II.

That plaintiff and Anna J. Roman during the times hereinafter mentioned were and now are husband and wife and are residents of the United States of America, residing at Seattle, King County, Washington; that there has been born as the issue of said marriage seven children, the eldest being a girl of fourteen years of age, and one of said children was Edgar Roman, deceased, and at the time of his death was of the age of twelve years.

III.

That plaintiff for a number of years past has been and now is physically incapacitated for labor and unable to support his wife and minor children, and his said condition is and will remain permanent; that said Edgar Roman, deceased has contributed materially to said plaintiff for the necessities of life and was at the time of his death contributing to the support of plaintiff and would

have materially continued to support plaintiff during the rest of his natural life. [38]

IV.

That the Oregon-Washington Railroad & Navigation Company is a corporation organized under the laws of the State of Oregon, doing business in the State of Washington; that the said railroad company owns, maintains and operates a set of railroad tracks within the limits of the city of Seattle, county of King, State of Washington, running in a westerly direction from a place known as Argo Station; that the said railroad company also owns, maintains and operates a track known as track No. 12 which from Argo Station in a westerly direction some three thousand feet; that said railroad company uses said track No. 12 to operate cars thereon for the purpose of cleaning out the same, and dumping refuse out of the cars on the right of way.

V.

That there is a well-defined road or path up to and across said track No. 12 from a point near the intersection of West Dawson Street and Third Avenue South, in a northerly direction and crossing said track No. 12 at a point approximately described as follows: beginning from the center intersection of West Dawson Street and First Avenue South, north 1349.97 feet, thence east 763.81 feet; that from said intersection with track No. 12 the said road or path continues on in a northwesterly direction to the intersection of First Avenue South and Spokane Street; that said path or road across said track has been continuously

and notoriously used by the public as a right of way over and across said track No. 12, without objection on the part of the railroad company for more than twenty years last past; that a great number of adults and children have been using said path or road over and across said track No. 12 as aforesaid; that no sign has ever been posted at or near said path, nor was there, on the date hereinafter mentioned, any sign, notifying children, or the child of this plaintiff to not go upon or across said track No. 12 at its intersection with said path. [39]

VI.

That on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 and commencing about four feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation; that said track where said cars were standing was on an "S" or reverse curve, preventing anyone using said path from seeing whether there was attached to said cars any engine or whether the same were to be moved.

VII.

That at about 4:00 o'clock P. M. on the said day, the plaintiff's children, Edgar and Charles, at the intersection of said path and said track No. 12, attempted to cross said track No. 12; that no employee of defendant corporation was stationed on or near said cars; that no warning of any kind or nature was given by any employee of the defendant corporation that said cars were to be moved;

that before crossing said track plaintiff's children stopped, looked and listened as to whether said cars were to be moved; that seeing and hearing nothing indicating any movement of said cars, they attempted to cross said track; that while crossing said track, the defendant corporation and its employees carelessly and negligently bumped one of its engines at the extreme eastern end of said line of cars, causing the same to move westward and upon and into said Edgar Roman, deceased, causing the same to strike the said Edgar Roman, injuring and damaging his legs by crushing the same at the lower shins; that said injuries were compound comminuted fractures; that by reason of said negligent and careless acts of the defendant corporation and its employees, it was necessary to amputate one of his legs; that said Edgar Roman from the date of said injury suffered great mental and physical pain and suffering to the 22d day of May, 1922, when on said date by reason of said injuries he died.

VIII.

That by reason of said pain and suffering of said Edgar Roman, deceased, from May 18th, 1922, to May 22, 1922, plaintiff has been damaged in the sum of Fifteen Thousand Dollars (\$15,000.00).
[40]

WHEREFORE, plaintiff prays judgment against said defendant corporation in the sum of Fifteen

Thousand Dollars (\$15,000.00) and for all his costs herein.

FRED C. BROWN,
J. STANLEY TYRRELL,
Attorneys for Plaintiff.

201 Lyon Bldg.
Seattle, Wash.

State of Washington,
County of King,—ss.

James Roman, being first duly sworn, on oath deposes and says, that he is the administrator of the estate of Edgar Roman, deceased, and plaintiff above named; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

JAMES ROMAN.

Subscribed and sworn to before me this 5th day of January, 1922.

FRED C. BROWN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 16, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [41]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer to Second Amended Complaint.

Comes now the defendant herein, Oregon-Wash-
ington Railroad & Navigation Company, a corpora-
tion, and for its answer to the second amended com-
plaint herein, admits, denies and alleges as follows,
to wit:

I.

It admits the allegations of paragraphs I and
IV thereof.

II.

Answering the allegations of paragraph II there-
of, it admits that the deceased had no wife and
children and that his parents during all the times
hereinafter mentioned were and now are residents
of the United States of America, residing at Seattle,
Washington. Except as herein expressly admitted,
defendant denies each and every allegation, matter
and thing contained in said paragraph.

III.

It denies any knowledge or information sufficient to form a belief as to any allegation, matter, statement or thing contained in paragraph III thereof, and it therefore denies the same. [42]

IV.

Answering the allegations of paragraph V thereof, it denies each and every allegation, matter and thing therein contained.

V.

Answering the allegations of paragraph VI thereof, defendant admits that on the afternoon of the 18th day of May, 1922, there was standing on said Track No. 12 a number of cars. Except as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

VI.

Answering the allegations of paragraph VII thereof, defendant denies each and every allegation, matter and thing therein contained.

VII.

Answering the allegation of paragraph VIII thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that the plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries, is not a crossing, public or otherwise, neither has any right of way to the public or to the said Edgar Roman ever been acquired over or upon said Track No. 12 in any manner whatsoever; [43] that said Edgar Roman at the time and place mentioned and referred to in said complaint, was a trespasser upon said track No. 12, which was situated in the switch yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and approximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take nothing in his complaint, and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE,

Attorneys for Defendant. [44]

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath says: That he is the agent and attorney for the

Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action, and is authorized to make this verification in its behalf; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 17th day of February, 1923.

E. I. JONES,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of attached answer to 2d amended complaint received and due service thereof admitted upon 20 Feb., 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorney for Pltf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer to Second Amended Complaint.

Comes now the defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and for its answer to the second amended complaint herein, admits, denies and alleges as follows, to wit:

I.

It denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing contained in paragraph I thereof, and therefore denies the same.

II.

It admits the allegations of paragraphs II and IV thereof.

III.

Answering the allegations of paragraph III thereof, it denies any knowledge or information thereof sufficient to form a belief as to any allegation, matter or thing contained in paragraph III thereof, and therefore denies the same.

IV.

It denies each and every allegation, matter and thing contained in paragraph V thereof. [46]

V.

Answering the allegations of paragraph VI thereof, it admits that on the afternoon of the 18th day of May, 1922, there was standing on said track No. 12 a number of railway cars. Except as herein expressly admitted, defendant denies each and every allegation, matter and thing contained in said paragraph.

VI.

It denies each and every allegation, matter and thing contained in paragraph VII thereof.

VII.

Answering the allegations of paragraph VIII thereof, defendant denies each and every allegation, matter and thing therein contained, and especially denies that the plaintiff has been damaged in the sum of \$15,000, or in any sum whatsoever, by reason of any negligence on the part of the defendant herein, or at all.

FURTHER ANSWERING said complaint and as an affirmative defense to the alleged cause of action therein contained, defendant alleges:

That the place mentioned and referred to in said complaint as the place where the said Edgar Roman suffered said alleged injuries, is not a crossing, public or otherwise, neither has any right of way to the public or to the said Edgar Roman ever been acquired over or upon said Track No. 12 in any manner whatsoever; that said Edgar Roman at the

time and place mentioned and referred to in said complaint, was a trespasser upon said track No. 12, which was situated in the switch yard of the defendant in the city of Seattle; that if said Edgar Roman was injured, as alleged in [47] said complaint, such injuries, and all thereof, were wholly caused by his negligence in crossing or attempting to cross said track No. 12, and by the negligence of the plaintiff herein and his wife, who then and there had said Edgar Roman in charge, in permitting and directing him to cross said track No. 12, and that the negligence of said Edgar Roman and the said plaintiff and his wife, was the sole and proximate cause of said injuries.

WHEREFORE, defendant demands judgment that plaintiff take nothing in his complaint, and that defendant be hence dismissed with its costs and disbursements herein.

BOGLE, MERRITT & BOGLE,

Attorneys for Defendant. [48]

State of Washington,
County of King,—ss.

W. H. Bogle, being first duly sworn, on oath, says: That he is the agent and attorney for the Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled action, and is authorized to make this verification in its behalf; that he has read the foregoing answers, knows the contents thereof, and believes the same to be true.

W. H. BOGLE.

Subscribed and sworn to before me this 17th day of February, 1923.

[Notarial Seal]

E. I. JONES,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [49]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess his damages in the sum of Four Thousand Dollars.

E. C. DAY,

Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [50]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find for
the plaintiffs and assess their damages in the sum
of One Thousand Dollars. .

E. C. DAY,
Foreman.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Dec. 15, 1922. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [51]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Judgment.

This matter having come on for trial before this Court, on the 13th day of December, 1922, the plaintiff appearing in person and by his attorneys, Fred C. Brown and J. Stanley Tyrrell, and the defendant appearing with its witnesses and by its attorneys, Bogle, Merritt & Bogle, and testimony having been introduced on behalf of the plaintiff and the defendant and argument of counsel having been made and the jury having been instructed and having retired to deliberate, and on the 15th day of December, 1922, returned into court with a verdict against the defendant and in favor of the plaintiffs in the sum of four thousand dollars:

It is hereby ORDERED, ADJUDGED and DECREED that upon said verdict a judgment be entered against the defendant for Four Thousand Dollars (\$4,000.00) and costs and disbursements to be

taxed, and judgment is hereby entered against said defendant for said sum of Four Thousand Dollars together with the costs of disbursements herein.

Done in open court this 21st day of December, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 30, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [52]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Judgment.

This matter having come on for trial before this Court, on the 13th day of December, 1922, the plaintiff appearing in person and by his attorneys, Fred C. Brown and J. Stanley Tyrrell, and the defendant appearing with its witnesses and by its attorneys,

Bogle, Merritt & Bogle, and testimony having been introduced on behalf of the plaintiff and the defendant and argument of counsel having been made and the jury having been instructed and having retired to deliberate, and on the 15th day of December, 1922, returned into court with a verdict against the defendant and in favor of the plaintiffs in the sum of One Thousand Dollars;

It is hereby ORDERED, ADJUDGED and DECREED that upon said verdict a judgment be entered against the defendant for One Thousand Dollars (\$1,000.00) and costs and disbursements to be taxed, and judgment is hereby entered against said defendant for said sum of One Thousand Dollars, together with the costs or disbursements herein.

Done in open court this 20th day of February, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

**Order Extending Time to and Including March 5,
1923, to Settle Bill of Exceptions.**

This matter coming on to be heard this 20th day
of February, 1923, upon the stipulation of the
parties to the above-entitled actions, through their
respective attorneys, for an order extending the
time for the settling and signing of the bill of ex-

ceptions in said actions, to the 20th day of February, 1923, or until such time thereafter as same may be heard by the Judge of the above-entitled court, and the Court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time for settling and signing said bill of exceptions be and the same is hereby extended to the 5th day of March, 1923.

Done in open court this 20th day of February, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [54]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

**Order Extending Time to and Including March 19,
1923, to Settle Bill of Exceptions.**

This matter coming on to be heard this 5th day of March, 1923, upon the stipulation of the parties to the above-entitled actions, through their respective attorneys, for an order extending the time for the settling and signing of the bill of exceptions in said actions, to the 7th day of March, 1923, or until such time thereafter as same may be settled and signed by the Judge of the above-entitled court, and the Court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time for settling and signing said bill of exceptions be and the same is hereby extended to the 19th day of March, 1923.

Done in open court this 5th day of March, 1923.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 5, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [55]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Order Extending Time to and Including March 27, 1923, to Settle Bill of Exceptions.

This matter coming on to be heard this 27th day of March, 1923, upon the stipulation of the parties to the above-entitled actions, through their respective attorneys, for an order extending the time for the settling and signing of the bill of exceptions in said actions, to the 27th day of March, 1923, and the Court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time for settling and signing said bill of exceptions be and the same is hereby extended to the 27th day of March, 1923.

Done in open court this *27th* day of March, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 27, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN, His
Wife,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that these causes came
on regularly for trial upon the stipulation of plain-
tiffs and defendant therein, by and between their
respective attorneys, that same be consolidated for
the purposes of trial in the above-entitled court,
before the Honorable Edward E. Cushman, District
Judge, sitting with a jury, on the 13th day of De-

cember, 1922, plaintiffs being represented by their attorneys, Fred C. Brown and J. Stanley Tyrrell, and the defendant being represented by its attorneys, Bogle, Merritt & Bogle and E. I. Jones.

WHEREUPON the following proceedings were had:

Testimony of Samuel C. Humes, for Plaintiffs.

My name is Samuel C. Humes; I reside at 3146 Thirty-fifth [57] Avenue South, Seattle, and have been a resident of Seattle for almost forty years. I was county engineer for four years. Referring to Plaintiff's Exhibit 1 for identification, I made said plat from the actual survey in June of this year. I was on the ground then and used to play there when I was a boy. I worked there when I was working for the city of Seattle, about 1911, locating streets and taking levels for a sanitary fill; in doing that work I had to go through that neighborhood. There is a path commencing at the corner of Second Avenue South and Dawson street. It is a sort of a "Y" shape. One trail starts in about the intersection of Second Avenue South and runs in a northerly direction, and 105 feet east there is another trail, and joins about 75 yards north of the center line of West Dawson Street. The trail runs in a northerly direction to South Seattle. It crosses the O.-W. tracks. We used to hunt down there when we were boys. I think it was about the same trail. It is well beaten. It used to go on an old dike where the old river used to make a bend in towards South Seattle and was a trail along that

(Testimony of Samuel C. Humes.)

dike. It was a well-traveled trail when I surveyed there in 1911. I was surveying there at that time about five or six months and saw people passing on said trail frequently, both children and grown-up people; it was used daily. It is the same trail I used when a boy playing over in there, and is the same trail that I saw when I went to make the map. It is a well-beaten track now. Just before you cross the railroad track there is a ditch along there with two planks over same. (Witness was then shown a photograph marked for identification as Plaintiff's Exhibit 2.) I recognize the locality shown in Exhibit 2. It shows two planks crossing the ditch and a trail leading up to the track. The track with reference to the ditch is on a fill of about six or seven feet, and that is a picture of the situation. [58] Exhibit 2 was then admitted. The track runs along the top of the fill. I know a man named William Buck and used to go to school with him; he resides in Georgetown; I used to play with him when we were children and have seen him using that path. Both of us would go over and across that path. Mr. Buck still lives in that part of town. The path crosses the track using the point "OO" as a base, 1811 feet north along the center line of First Avenue South and 301 east, to this point.

Cross-examination.

When I was a boy and played over this track of land the O.-W. R. & N. did not have this track there; the track was put there some time before

(Testimony of Samuel C. Humes.)

1911. The property on the east side of First Avenue is vacant property; there are several paths over this property, cow-trails and things like that. The trail coming from Dawson Street is an old wagon trail for a portion of the way. The wagon trail ends about 150 feet this side (south) or where the planks cross the ditch. I know of no reason why the wagon trail should end there. It might have gone some other direction. I would be willing to swear that it is exactly the same that I traveled before. When I was a boy the wagon trail went out a little to the left across First Avenue to the river bank. The river used to come down and wind around until they straightened it out, and there was a dike along the edge of the river. It used to follow that dike and go to the right over in a south direction. When you came from South Seattle it was a handy way of getting down over the hill and come down that way. It is a fact that in here (to the north of track 12) was a tide flat and water stood there. I cannot say that there was water where the scrap iron dump is now; there was some high ground [59] in there. There is water standing in there up to the scrap iron dump now. The water extended up to the dike. I cannot tell exactly where the dike was; it has been years and years. Where the trail hits the track it goes directly over. The trail crosses the track at about a 45 degree angle. The first time I saw this trail off the track was when I surveyed the map; that probably

(Testimony of Samuel C. Humes.)

was there just in recent years, since the scrap iron dump was there.

Redirect Examination.

“Q. I understand you to say that this trail along after it passes the track, along in here, is on the natural elevation that was there at the time when you were a child and played there?

A. Well, now, as far as the scrap iron dump is concerned, that wasn't there, but beyond it is.”

Testimony of Byron Leroy Edson, for Plaintiff.

My name is Byron Leroy Edson and I reside at 5403 Maynard Street, in the south end of Seattle; it is about three blocks from Argo Station; I have lived there about twenty years off and on; I am a married man and have children. I know where Second Avenue South and Dawson Street is. I used to travel on a path apparently continuing Second Avenue South about twenty years ago and said path is there at the present time. I should judge it runs into the railroad there about between Second and First and goes on over to the city dump. I used the trail there twenty years ago. It followed on that high ground above the swamp there and came out on what they used to call Smith's Lane. I used to solicit groceries for a grocery store in South [60] Seattle, and I would strike the dike on the river and come down the dike and then take this footpath. The path relative to the dike was

(Testimony of Byron Leroy Edson.)

about where the bridge over the old river is at the present time. Quite a few people used that path twenty years ago. Children used to go through there going to school at South Seattle. Georgetown did not have a school at that time, and all the children in Georgetown went to South Seattle. Those that lived at the lower end down near the river used this path. I have been over that path frequently recently. It is the same path that was there twenty years ago; it is right in the neighborhood of the same path, and has been in constant use. I saw the path last summer; it showed that it had been used since that time; it was well worn. I would say that Plaintiff's Exhibit 2 shows the going up on the track off from the east. There are planks across the ditch. I know where the path crosses the track. I have seen cars on the track; I have seen cars standing on the path, but the majority of the time I have went down there I have noticed there was an opening by the path. I built a road under the trestle, First Avenue; I think it is Dawson, or some such street as that. We built the approach up to the pavement under First Avenue and over to the track. The road ended at the path. I should judge that around 50 or 60, somewheres there, used that path daily. I used it frequently during shipyard activities and other people in my locality used it then. I have seen several of them use it. I used it myself every day. I used to walk to work in the afternoon and used to walk to work that way. I should say that the distance from

(Testimony of Byron Leroy Edson.)

Second Avenue and Dawson Street to the place where the path crosses the track was about a quarter of a mile. I have never seen any sign at the path, forbidding people using it. The track [61] has been there something like twelve or thirteen years, and I have used the path frequently during that time. The company did put up a fence there. The fence remained there for some time, but there was a hole cut through the fence and the fence was afterwards torn down or pushed down. It has been about eighteen months since the fence was up. It was a wire fence—pig wire or chicken wire. There was a hole there very shortly after it was put up and people were using it. I did not recognize any employees of the railroad company using it. The boys used to go there skating in the winter time—several of them, several times. I never was down there skating. The people from the south end in order to get to the dump, would have to cross the railroad track at that pathway. I have seen people using that path for the purpose of getting wood. In the city dump there were lots of boxes, barrels, refuse, wood, tin, sheet metal and old parts of automobiles. I know that a considerable part of the south end got their wood from that dump. There is no other path that crosses the track. There is no other way that you can get across the track without crossing over First Avenue, going up over the trestle. On First Avenue there is a high trestle.

(Testimony of Byron Leroy Edson.)

Cross-examination.

The fence along the track is between the track and the ditch. I should say that the fence was built seven or eight years ago. Since then until eighteen months ago, the fence was kept up, with the possible exception of a hole being made through it. In lots of places where they had dumped the refuse out of the cars it had shoved the fence over. During the war no one challenged me for going through the yard but once. [62]

There was an old wood road there twenty years ago. There is no one that I know of living near the intersection of this path with track 12. It is about five blocks to the nearest house. The only building inside of the tracks is the Ice Company and that is on the other side of the track and on the other side of the dump. That building is about a block from track 12. The trail hit the dike before the river was changed at about where the Interurban Bridge is at the present time on First Avenue. There was no necessity for, nor was there, any trail going over the track, as the trail is indicated on the plat—Plaintiff's Exhibit No. 1 for identification. Before the scrap iron was dumped or the garbage was dumped on this (north) side of the track, the water extended up to the dike. I did not notice any signs at the trestle, and I could not say that I looked for any. I went across the track for my own convenience. I was not working for the company.

(Testimony of Byron Leroy Edson.)

“Q. Now, that is not the only way that people from Georgetown, or from down in here, could get to the dump pile, is it? You don’t want the jury to understand that that is the only way they could get there?

A. That would be the shortest way.

Q. That is the most convenient way?

A. Yes.

* * * * *

Q. There were other ways in which you could get to the dump pile?

A. There was other ways.

Q. But this was the most convenient way for people living there? A. Yes. [63]

Q. (By Mr. JONES.) Mr. Edson, you say that at various times you crossed this track, or walked down the track? A. Yes, sir.”

I crossed the track at various times. Going from Duthie’s I would go down and take the trail, crossing the dump, and then take the other track and go down to Spokane Street. The incline on the other side of the grade was not much steeper than going up (on the south side). It is a very short grade, and I presume the grade is about six feet in twenty feet. There was a track through the scrap iron dump in places—little paths. I saw cars on this switch (track 12) several times when I walked through there. I have seen them switching cars in there. They dumped all their cars there and it was a track that was used a great deal. I remember another fence besides the railroad

(Testimony of Byron Leroy Edson.)

fence near the track. It was about 20 or 30 feet from the railroad fence. It ran down from First Avenue for a quarter of a mile or so; part of the fence was there before the railroad was in there; the tract was used for pasture and the fence was kept up for awhile. The last time it was used for a pasture was about six or seven years ago. It was only a barbed-wire fence; you could crawl through there, a couple of strands of wire through there. I used to crawl through the fence. It was built across this trail. I know of none of the fence standing now. I have been there lately and have never noticed any fence along there, excepting the railroad fence.

Redirect Examination.

I worked at Duthie's Shipyard for four years. If anybody from the east of First Avenue in the vicinity of Georgetown wanted to walk into Seattle or to South Park, they would have to either go over First Avenue or take that trail. First Avenue has a wagon road. The path would be the only way they could get to the dump, without walking down the tracks and going up around First Avenue and coming back around. [64] They would have to go eight or ten blocks further, or more than that. The other fence that was up six or seven years was on private property; it was not the property of the railroad company; it was put in there and used for a short time as a pasture. It never interfered with me; I always went through it and I have seen

(Testimony of Byron Leroy Edson.)

other people use it in the same way, frequently and continuously.

Recross-examination.

“Q. I believe you stated in direct examination that at times you would go up on this path to the track, and there would be cars standing on the tracks? A. Yes, sir.

Q. How would you get by them?

A. Well, there was a path on each side of the track.

Q. You just walked down alongside of the track until you got to the end of the cars, and then went over it? A. Yes, sir.”

Testimony of William Buck, for Plaintiff.

My name is William James Buck; I reside on Dawson Street and Third Avenue South in Georgetown; I have lived there about twenty-three years, and lived in Seattle about eight years before that. I know a man by the name of Samuel J. Humes and knew him as a boy. There is a path leads north from Second Avenue South and Dawson Street. It originally lead to a dike, and that dike lead down to South Seattle, where there was a saw-mill. I should judge that was about twelve or fifteen years ago. That path has been in use during the time that I have known it every day. I am a blacksmith. I would say that I have been over the path twice a day every day that I have been out there in this [65] twenty-three years. I would use the path in going to work and coming from

(Testimony of William Buck.)

work and other times going down there to get wood; there is lots of wood down there in that vicinity and I would go down there to get wood. It is near the Argo tracks in the Argo yard. I have seen quite a few people get wood there. I have never seen ten at one time getting wood there. I should judge that four or five people from the South end used it going to and from their work.

“Q. Do you know how many people in the South end that worked in the shipyard and used the path; if you know of your own personal knowledge, from time to time, that used this path; would you say twenty-five or fifty people?

A. There not many,—four or five.

Q. How often would people go down to that dump to gather wood and things from the dump? Would they use it daily for the purpose of going down there to get wood?

A. No, sir; I don't believe they would; I would say a couple of times a week.”

I guess about a dozen families in that vicinity would get their wood and supplies there. Many others would run in there with their automobiles and cross over that track, and come in where this sheet iron was, and pick out what they would want. You can get within fifty feet of the track with an automobile. It is a well-defined path, well trodden down for years. I could not say that I have ever seen any sign at the path. I do not remember seeing any signs warning people not to use the path.

(Testimony of William Buck.)

I was never forbidden to use it. I have seen children going to school across the track; but it is in the opposite direction from what that path is, that is, the children were going [66] east and the path runs north and south; but the children had to cross that railroad track. Well, I guess they crossed it at this point sometimes; they could either go down the track, or go around it. They would not use the path at all. The path was running north and south. They would use the path if they were going to the Georgetown school, some of them did, but most of them went to the South Seattle school, most of the children that lived in there.

I have noticed that the locality south of the dump would be frozen over in the winter-time and people used it for skating. I have seen women and children skating; I don't know as many men. They would use that path in order to get there. I could not testify as to whether it (the path) was absolutely and notoriously used. A great many people used it frequently. I never heard anybody being forbidden to use the path by the railway company. Plaintiff's Exhibit 2 shows the crossing over a small stream and the path that runs up on the fill or on to the track. The planks have been there nearly two years, I imagine. I don't remember how I got by there when the planks were not there.

Cross-examination.

I used the path this morning. I am pretty sure that I have used the path every day twice a day for

(Testimony of William Buck.)

the last couple of weeks. They used track No. 12 for empties most of the time; they also did some cleaning there; they cleaned out cars. They used the track pretty much. Between the ditch and the track there has been a wire fence, about eight feet high, made by mesh wire with one string of barbed-wire on top. The fence was kept up since before the war, I guess; it was built about 1916. For a year [67] or two there I think we got through a hole in that wire fence, right where the path is over the stream. I don't know who put the hole there. I have lived in that vicinity twenty-three years. I remember the tract of land being used as a pasture for cows. I remember a fence being built, about the width of a street, from the railroad right of way, running parallel with the track. There was no fence where the path was that I remember of. I never had to crawl through any fence at the path. There was a fill at the track and the cows could not very well get over; they often used to go down into the stream. Never saw any trespassing signs.

I am acquainted with Mr. Roman, plaintiff in this case, slightly. I have met him down there when he was getting wood and spoke to him a couple of times. I met Samuel Homes down there one day; he asked me if I lived around there; I told him "yes."

(Witness excused.)

The COURT.—We will take a recess for fifteen minutes, and go with reporter and counsel into my chambers.

(In Judge's chambers, in the absence of the jury, a discussion took place between Court and counsel in reference to condition of the two complaints.)

The JUDGE.—Where is your allegation in there that they were dependent on the deceased for support (referring to case No. 7019)?

Mr. BROWN.—It is a clerical error; that is where it should go.

The JUDGE.—Can't you sit down and try and fix up this record on the two cases, so that the trial can go [68] ahead? Here is an administrator that can be substituted in No. 7018, and as long as there is a party capable of suing there is no use going on and taking a chance on what looks to me like a mistake.

Mr. JONES.—I don't understand that the two actions can be brought by the administrator.

The JUDGE.—No, it has just been decided that the pain and suffering action has to be brought by the parents, and that the other,—they have brought it by the administrator, which is as I would have brought it, if I only had the case of Meshak vs. Seattle before me.

If you will fix up your amendments, I will allow them. You can dictate it to this reporter and have him run it out afterwards, and you can go ahead.

Mr. BROWN.—The title “James Roman, Administrator,” should be put on case No. 7018, and No. 7019 should be James Roman and Anna Roman, instead of the administrator.

The JUDGE.—I will go on with your cases if you file them,—your motions to-morrow morning, and it will be considered as though put in prior. It is purely formal, these amendments are, as long as I give you an opportunity to make your record; that is all you want, I take it.

Mr. BROWN.—In No. 7019 put in paragraphs III and IV of No. 7018, as a part of paragraph II of No. 7019.

In No. 7018 it should be “James Roman, Administrator,” and in No. 7018 substitute “James Roman and Annie Roman, husband and wife,” as plaintiffs.

The JUDGE.—Of course, there is an allegation in No. 7019 that the deceased was not married, and left no children. I guess you have an allegation in both cases, that the [69] parties for whose benefit defendant is sued, are residents of Seattle.

Mr. BROWN.—That is a part of these pleadings now.

(Trial resumed. Jury present.)

Mr. JONES.—If your Honor please, I forgot to state that I want the record to show that we except to the amendments.

The COURT.—You except to my order allowing the amendments?

Mr. JONES.—Yes, your Honor.

The COURT.—Exception allowed.”

Testimony of Dr. W. H. Corson, for Plaintiff.

My name is W. H. Corson; I am coroner of King County; have been such since the first of this year and was such on the 18th day of May of this year. I held an inquest to determine the cause of death of Edgar Roman. The jury met at the County-City Building, and went from there to some railroad tracks near Argo, Georgetown. The place where I went to on the railroad, the spur running from the railroad yards, where I was told the accident happened, there was a trail; it was a footpath and it was made by use. It was a very well-defined footpath. I cannot testify to the injuries of Edgar Roman directly.

Testimony of Dr. M. C. Lile, for Plaintiff.

My name is M. C. Lile; I am an orthopedic surgeon, licensed to practice in the State of Washington. About May, 1922, I had occasion to attend one Edgar Roman at the King County Hospital. As I remember he had a compound fracture of [70] of both legs below the knee, with the bones markedly displaced and considerable injury to the muscles and soft parts. An operation was done in which the wounds were cleaned and parts of the tissue removed, and the bones were set as well as possible to do so at that time. Subsequently—I cannot give you the exact date—a severe infection developed, and after that I made multiple incisions in one leg, at least. Subsequent to that time there was very material improvement for a day or two,

(Testimony of Mrs. Elizabeth McConahey.)

when this infection again began to appear, necessitating the amputation of one leg; I believe it was the right leg; but I could not be certain. After that, he died from the result of this injury.

Testimony of Mrs. Elizabeth McConahey, for Plaintiff.

My name is Elizabeth McConahey; I reside in Seattle and am head nurse at the King County Hospital; have been so since 1915. I recall the occasion when Edgar Roman was brought to the hospital. Both his legs had a compound fracture. The boy suffered very keenly, a very great deal of pain, especially after the infection developed. There were no expressions of pain by Edgar during the time he was there; he was restless, very restless; he had to be kept under opiates. He came in on Thursday and died on Monday, I believe.

Testimony of M. H. Stevens, for Plaintiff.

My name is Matthew H. Stevens; I reside at 134 Brandon Street, about two blocks from Dawson and Second South. I have lived in Seattle fourteen years, and about three years at my present address. There is a trail from West Dawson Street and Second Avenue South leading towards the city; it goes to the [71] old city dump. It crosses a railroad track before it reaches the city dump in two places that I know of; it is used extensively. To the best of my knowledge, people have gone up there for wood and different things on the old dump, metal and whatever they should want there that is thrown

(Testimony of M. H. Stevens.)

on the garbage dump. It is not used for coming into town or work that I know of. I have used the path, but not for a year; I used to use it every few days. I used to go up there for wood, and sometimes pieces of metal that I should want to use at the old dump. I don't know anything about people skating on the low land on the other side of the path. I saw no signs forbidding people using the path and was not prevented from going back and forth there. The path looks like it is used every day; it is well worn.

Cross-examination.

I didn't use it every day; every day that I have been there I have seen other people on it. I have seen them switching there quite often. The track, to the best of my knowledge, is used for storage and cleaning cars. There were cars across this path at times when I went over it. I would have to go around the end of them. Every time that I have been there there has always been a place to get around the end. There was an old fence there; but there was always a hole in it in two or three different places. Three years ago is the first time I knew anything about the place; I have not been over the trail for about a year.

Redirect Examination.

The end of the fence was just south of where the trail crosses. About a year ago, or a little over, that fence was pushed over by the railroad company. I saw where the fence had been pushed over by the dirt being piled on it. [72]

(Testimony of M. H. Stevens.)

Recross-examination.

I did not see them push it over; I was not there when it was done.

Testimony of Peter J. McGraw, for Plaintiff.

My name is Peter J. McGraw; I am general yardmaster for the Oregon & Washington Railway, stationed at Argo, Seattle. I have been yardmaster since June, 1918. I have been in the employ of the Oregon & Washington Railway Company since December 30th, 1909. At that time I was night yardmaster. W. H. Barr was yardmaster at that time; he is the present deputy jailer. I recollect the 18th day of May. As near as I can figure, there were about fifty-seven cars on track 12 in the afternoon of that day.

Cross-examination.

At that time of the year—May 18th, 1922— we were using this track extensively, probably a dozen or twenty times a day. We used this track for pushing in cars for cleaning purposes.

Redirect Examination.

I have seen men working there during the day cleaning out these cars at times. We notified the men when we pushed in cars there. The foreman at the forward end goes along the line and notifies them to look out, and we do that every time when men are working there. [73].

Testimony of T. M. Brown, for Plaintiff.

My name is T. M. Brown; I live at 310 Brandon Street, but at present am a patient of the Firland Sanitarium. I live about four blocks from Second Avenue and Dawson Street, and have lived there almost fifteen years. There is a trail from West Dawson Street and Second Avenue leading north. It leads up north, kind of winds around a little bit. There is one leads up to the railroad track, and there is another one leads off through under the First Avenue road. One of them runs up to the railroad track. It runs across a little ravine where they crossed the track. I suppose sometimes it is across it. There is a path beyond the track that runs down through the dump. I used the trail last year for hauling wood from the dump. There were others going up and down there. I used it maybe a couple of times a week, sometimes more. I cannot say how long the path has been there. I did not use it until 1921. It is quite a good trail. There were others getting wood there; three or four or five that I would see at different times. I could not say just how often I would see them, because I did not pay any attention to them. They were neighbors.

Cross-examination.

I never used this path until 1921. I did not go over the track to town. I generally went to town on the street car or on First Avenue. When I went to South Seattle, I always went down over

(Testimony of James Roman.)

Eighth Avenue. The only time I used the path was for hauling wood in 1921. I never used it to go to South Seattle or go to the shipyards. [74]

Testimony of James Roman, in His Own Behalf.

My name is James Roman; I am plaintiff in this action, and am the father of Edgar Roman. (Letters of Administration, marked Plaintiff's Exhibit 3 were offered and admitted.) I have lived in Seattle seven years; I am fifty-three years old; I lived in South Park awhile, and the last two years I have lived in Georgetown. My wife is living and six children, aged 15, ten, seven, six, four and three. The children reside with me. I am a laborer and have no trade. In 1911 I had my neck threw out of place. In the last two or three years I have not been able to do hard work, because of that injury and bad kidneys. I have rheumatics, and I came very near going paralyzed four times. I can't look up overhead to amount to anything; I go plumb crazy trying to look up overhead and work. I am better this summer than I have been in between two and three years; I have been trying to work five months, and got in three. Working for wages, I have worked about seven months in between two and three years. I have done better this summer than I have in between two and three years, and I worked a little over a month at one stretch. During the three years previous to this summer, I worked sometimes a couple of weeks, sometimes a month, and sometimes maybe six weeks. I had bad kidneys. I

(Testimony of James Roman.)

was hurt in the back about twenty years ago, and my back bothered me, and my neck and head. I would get down and out. I couldn't lift any more. From heavy lifting my spine gets on the bum until it runs me crazy nearly. My wife worked out. Sometimes she has got \$10 and the last job she has been on was \$13.20 a week. Edgar has supplied wood for people, mowed lawns, and when I was not able to keep us in wood from the dump, he would. He has taken care of little children for people, [75] done janitor work and peddled papers some. He mowed Mrs. Morris' lawn and worked at different kind of work for her. He dug potatoes for Mrs. Laughlin and put them away, and picked apples, and he would do anything that he could get to do. He worked whenever he had an opportunity. He attended school, and after school went out in the garden and worked or went after wood and anything there was to do. He would bring the money he earned to me or his mother and never spent any on himself. I had a garden about 100 feet square. He would take care of the garden when I was not able to take care of it. At school he was a bright boy and learned fast. (Plaintiff's Exhibit No. 4 was offered and admitted.) Anybody that is proficient in those certain lines of work would get a card. Edgar got most of the wood at the dump. He went to the dump by way of a path commencing at Second and Dawson. The path is about, I would judge, between a half and three-quarters of a mile from our home. In moderate

(Testimony of James Roman.)

weather he would make about two or three trips a week. On Saturday he would make maybe two trips or maybe just one, and then go of evenings. Sometimes he would get very near enough on Saturdays to last all week. In the year previous to May, we did not buy any fuel from any source; all the wood was obtained at the dump. There is a railroad track that you cross in going to the dump. The track is about half a mile from Second Avenue and Dawson. The path has been used extensively since I have been there.

“Q. How can you get to the dump which way? Are there other paths, or other ways to get to that dump besides this path?

A. It would be the nearest for me, the path, unless you would go around.” [76]

Some of the people were my neighbors and lots of them I did not know. When I crossed this track I have seen cars on it; they were in different positions; sometimes there would be an opening close to the path, between the cars; sometimes I would go around the end of the cars, and sometimes I would throw wood over between the cars, and then load it on my wheelbarrow and wheel it away. Sometimes I would wheel it across the track, put a board down.

On the 18th of May, 1922, Edgar had occasion to go to the dump. He left home about four o'clock with Charlie. I next saw him at our gate on a wheelbarrow, with Mr. Cole and Charlie. Mr. Cole lives over in the timber, close to the trail that

(Testimony of James Roman.)

goes to the dump. We took him in the house, the wheelbarrow and all. I got him on the sofa that was in the house—or the two of us did. They phoned for Dr. Guthrie. He came in, I think, something like an hour afterwards. My wife came in about twenty or thirty minutes afterwards. Edgar said he wished he could faint to keep from suffering, and asked for his mother. He lived four days and died on the 22d, at 7:30 in the evening. He was taken to the hospital between five and six o'clock. He suffered terribly, only when he was under opiates. He would groan some and was restless, and different times he had me to feel of his heart, the way it was jumping.

Cross-examination.

I live at 12 Brandon Street, and would judge that it is about three blocks—maybe not so far—from the O.-W. R. & N. track and roundhouse. Our house was got for us by Mr. Ewing from the O.-W. R. & N. I have seen the time there was an opening between the cars. When the cars were on the track over the path, I would sometimes go down on the fill and go around the [77] end; sometimes I could not and we would throw the wood over between the cars. I would cross between the cars on the drawheads, if I could not go around, that is, if it was too far. I never done that many times, but I have done it. I did not crawl under the cars. The boys never crawled under the cars while I was with them. I warned them as to that, and their mother and I warned

(Testimony of James Roman.)

them about looking out for cars around there. I knew this track was used a great deal; I knew it was a storage track in which they often times kept many cars. There were many times when the boys went for wood alone. Their mother never went but once; she walked over there one evening. It was me that went over there and got the first wood, after that I took the boys and showed them where the wood was, and if we were out of wood I either told them to go, or else the boys would see we needed it and went. I never told the employees of the road after the accident happened that I knew we were trespassing there. I supposed that from the place where the fence ran along the track, that from there on over to the dump, was railroad property and that the railroad track, of course, was railroad property.

Redirect Examination.

No one connected with the railroad company ever told me not to go there. There were no signs up. The fence was down since I have been there by the path. I saw a great number of people using the path.

Recross-examination.

I saw a switchman down there a few times. We had been going over to the dump for just about a year before the accident. We have not got anything from there since Edgar was killed. [78]

Testimony of Frederick Cole, for Plaintiff.

My name is Frederick Cole; I live at 210 Dawson Street; I have a house in there in the pasture, not on the street; I have lived there about four years. The trail from Second Avenue and Dawson Street passes my house. I have seen people using it frequently; it is not a daily occurrence. That path does not lead across track No. 12; it leads towards the dump.

I remember the 18th of May, 1922, when the boy was injured. His little brother came for me and I went back to assist him. He had the wheelbarrow wheeled already a piece, maybe a block or two. The injured boy was laying there on the wheelbarrow; he could not move. When I came up to the boy he was on the wheelbarrow. I assisted the little boy in wheeling him home. The boy was groaning.

Cross-examination.

My house is about even-ways between Dawson Street and the railroad track. I have been down as far as the railroad track. I noticed the trail that went to the bridge, the trestle. I don't know exactly the place; but as soon as they leave there they go over the railroad track.

Testimony of J. A. George, for Plaintiff.

My name is J. A. George; I am foreman of an engine for the O.-W. R. & N. I was in charge of an engine on May 18th, 1922. I had two helpers

(Testimony of J. A. George.)

with me—Frank McPaulin and Cliff Hatton. I went in on track 12 with one car at about four o'clock. When the engine and car moved that train I was by the engine and cars [79] on the ground. One of the switchmen was on the footboard and the other was making a coupling on the stock car with the car that we had. The engineer and fireman were in their places. The three of us were standing on ground together at head of the engine.

Cross-examination.

As near as I can recollect, there were at that time between fifty-five and fifty-seven cars on this track. I had just gone to work at four o'clock, and that was my first move. I had been working there for twelve, going on thirteen, years. I went in on that track maybe a dozen times a day for the last twelve or thirteen years. During that time I have never known of any other accident happening there; no accident whatever.

Redirect Examination.

No, sir; I have never known of any accident putting cars in on those tracks. There was no one had his leg cut off on one of those tracks in the Argo yard.

Testimony of Charles Roman, for Plaintiff.

My name is Charles Roman; my brother, the boy who died, was Edgar; I am ten years old. I remember the path at Second Avenue South and West Dawson Street. The path goes to the dump;

(Testimony of Charles Roman.)

it crosses the railroad track. I remember the last time I was there. Edgar and I left home about four o'clock, with a wheelbarrow and an axe. I was ahead when we reached the railroad track. Edgar was wheeling the wheelbarrow. There were box-cars on the track. I could not see the end of the cars. I looked down toward the end of the box-cars before I went across. I could not see any man. I could not hear any whistle. I could not see any engine. I went across the track and looked [80] down the track, I did not see any switchman or employee of the railroad. I could not see any engine or hear any whistle. There was nothing that attracted my attention that those cars were going to move. Then Edgar he came up to the track with the wheelbarrow and went to go across. He pushed the wheelbarrow between the tracks. When the wheelbarrow got on the track the box-car next to us was about a foot away. (Plaintiff's Exhibit No. 5, a photograph, was offered and later admitted.) That (referring to Exhibit No. 5) is me and Ed Sylvania; that wheelbarrow is Mr. Brown's, and it is the wheelbarrow that Edgar and I had on the day of the injury. The picture was taken on the railroad track. It was at the place where Edgar was injured. At that time I went to put the wheel over; it was in the position just like that position in the picture. When we were in that position that day the cars bumped and knocked the wheelbarrow and hit Edgar and knocked him down. I did not hear anything. The

(Testimony of Charles Roman.)

first thing I saw it hit the wheelbarrow and knocked Edgar down. He laid on the rail; his feet was on the rail, and his head was on the other side of the rail. It ran on his legs just enough to crush them, and then rolled back again. I took the wheelbarrow and turned it around and took him by the shoulders and put him on the wheelbarrow. Then I started down the hill, and I put my weight on the wheelbarrow and went down. I went across the planks. I went about to those two stumps, and then I went to get Mr. Cole. I came back ahead of him. Edgar had crawled about a half a block along the path. I ran and got the wheelbarrow and put him on again. Edgar said he would rather faint than have the pain hurt him so. I took him by the shoulders and put him on the wheelbarrow. We took him home. My father was working in the garden; [81] my mother was working at the can factory. I had to go back to the track after I got Edgar home to get the axe. There were three more cars past the path then. My mother came near five o'clock, when she got home. (Photograph marked Plaintiff's Exhibit 6 was offered in evidence and admitted.) That (Plaintiff's Exhibit No. 6) is at the gate where I came in between Second and Third on Dawson. It is the entrance to the path.

Cross-examination.

“Q. How many planks were there across this slough? A. Two planks were across.

.(Testimony of Charles Roman.)

Q. On that day? A. Yes.

Q. Do you know who put them there? A. No.

Q. Now, Charles, when you and Edgar got up to the track, you say there were cars standing on the track? A. Yes.

Q. Was there a car right in front of you?

A. Yes.

Q. Then you had to go around the car?

A. Yes.

Q. How far did you have to go around; how far did you have to go down the side of the track to get around?

A. About a foot away from it.

Q. The car was about a foot away from you when you crossed; but how far down the side of the track did you go before you got to the end of the car?

A. I never measured; just a little ways.

Q. About a car-length? A. Yes, sir. [82]

Q. Were there any cars from where you went across to the trestle? A. No:

Q. Did you ever notice, Charles, that there has been a path to the tracks down there? A. Yes.

Q. Also on this side? A. Yes.

Q. Then you could have gone down with the wheelbarrow this way? A. Yes.

Q. Or over here on this side (pointing)?

A. Yes.

Q. You didn't have to cross the track right at that place where you crossed it, did you? A. No.

Q. But you and Edgar went just to the end, and as soon as you got to the end of the box-car you

(Testimony of Charles Roman.)

turned your wheelbarrow around and tried to get across. A. No.

Q. Didn't you try to get across there?

A. In just about a minute after we got there. I looked and listened before.

Q. Of course, you stopped and looked and listened; but you didn't go very far from the end of the car before you started to go across? A. No.

Q. When the cars bumped they didn't go very far, did they? A. No. [83]

Q. Just two or three feet?

A. Just enough to run on to his legs and back again.

Q. And if you and Edgar had been down a couple of feet from there that car would not have got him?

Mr. BROWN.—I object to that.

The COURT.—Objection overruled.

A. No.

Q. You boys had been down to get wood there several times? A. Yes.

Q. And sometimes your father went with you?

A. Yes, sir.

Q. And sometimes your mother went with you?

A. Yes, sometimes.

Q. And sometimes when there is a long string of cars on the track so you could not walk clear to the end of them, would you crawl under the cars?

A. No, we went over the top of them.

Q. Over the top, or between the cars?

A. Between them.

Q. Over the bumper?

(Testimony of Charles Roman.)

A. Yes, over the bumper.

Q. Over the couplings? A. Yes.

Q. Did you do that when your mother was with you sometimes? A. Yes.

Q. And you did that when your father was with you sometimes? A. Yes. [84]

Q. You don't remember about crawling under the cars? A. No."

Redirect Examination.

There are two paths leading up to the railroad track from those two planks. I took the one that went the longest—the one to the left. There is nothing on the right of way along there. The box-cars were about two or three yards across the path, about a box-car.

"Q. Was it two or three yards, or a box-car from the path where you crossed over?

A. Not quite a box-car.

Q. And you went to the end of that box-car, and a little beyond it? A. Yes.

Q. Then you crossed over? A. Yes."

Testimony of W. H. Barr, for Plaintiff.

My name is W. H. Barr; I am a deputy sheriff of King County, and am jailer at the county jail, second shift. I have been a paid deputy for nearly four years; previous to that time I was General Yardmaster for the O. & W. Railroad Company at Argo, Seattle, Washington; I occupied that position for about nine years and six months; I have been in the service of railroads about thirty

(Testimony of W. H. Barr.)

years. I have been practically everything on a railroad from water-boy up. I have been yardmaster, fireman of engines, conductor, brakeman and operator. Track 12 at Argo is the cleaning track; it begins between seventy-five and [85] and one hundred yards north of the yard office at Argo, and goes in a kind of northwesterly direction—I can't say exactly—and then turns at No. 13 switch to the right, going a little bit more direct north, and runs down and makes connections with what we call the Barton lead. There are about a half dozen footpaths crossing track 12. Before we put up the fence there were a dozen paths all the way across the yard there, everywhere. I cannot tell about Second Avenue and Dawson, because those streets, because when I was out there those streets were not platted; it was just a kind of swamp through there. I know where the scrap iron dump is located. It is swampy down there. There was a path leading across the track toward the dump at the time I was yardmaster a part of the time, and a part of the time it was not, because I tried to stop it. The wire fence was put up around the entire yard. It would last sometimes a week, and sometimes it would last twenty-four hours. I was never able to find out who would tear holes in the fence. I had no difficulties with the employees coming through at that place. I know that people used that path. While the fence was up they would come up on the path to the fence, and the fence went down to the First Ave-

(Testimony of W. H. Barr.)

nue South bridge, and through there, and they would go down and go around the wire fence to the edge of the bridge, and come back up, and go up to the dump. I could not say that quite a number used that path, because I never counted them; it was used. There was skating in the swamps in the winter-time; quite a few used the skating place. I have used it and have seen other employees there; also children and lots of grown-up people. They used that path, and they used No. 12 track and they used No. 13 track to the skating place. There is wood in the dump. I have noticed people using the [86] path for the purpose of gathering wood. I would not like to say frequently, because I never gave it any particular attention. I knew as an official people were using the path. There was nothing to keep them away. They came down where the garbage wagons comes down, and they came in from South Seattle, and they came across there, and that is one thing that I tried to get a fence up and keep it up to keep people out. That is not a reverse curve; that is a curve.

“Q. Did you have any knowledge that the public was using this path?

Mr. JONES.—I object to that as immaterial.

The COURT.—Objection overruled.

Mr. JONES.—Note an exception.

The COURT.—Exception allowed.

A. Yes, sir.”

I know from experience the position of the crew in backing cars. There are certain positions at

(Testimony of W. H. Barr.)

certain places. When there are cars being pushed ahead or back of the engine at certain places, a man must be on the head car. It is according to where they are passing, going over crossings, or things of that kind, and there are other places that all you have to do is to know the track to be clear. He has got to have knowledge of that before he moves. Up to the time I left the company there was not notice posted at this path warning people to keep away from it. There were notices down on some of the others. Where the tracks come from the main line into Argo, I had signs put up, and where the gate comes in, alongside of my house from Seventh and Lucile, I had to put up a sign by my gate, and when we put the big gate and the fence there, at Colorado Avenue, we had a sign put up there, and I had one sign down where I had the employee gate on the turnstile. I have [87] taken examinations as conductor, brakeman, and general yardmaster. I took a general course of examinations in the Union Pacific Educational Bureau. I had thirteen foremen under me. I had to have a foreman with every engine. I knew a man by the name of George working down there.

Cross-examination.

When I saw people trespassing on this track I did not tell them to get off, nor instruct my men to put them off. If there was a sign at the First Avenue Trestle, it wasn't put there with my orders. I would not say whether there was one or wasn't. It is not

(Testimony of W. H. Barr.)

necessary at all times when you are pushing a car on a track to couple it up in a switch yard to have somebody back at the end of it, nor is it necessary to have a man back there at the end of a string of cars when you are coupling up cars. While I was working there a fence was built. I left there the first day of June, 1918, or 1917; I cannot say for certain right now. The fence had been up some years before I left; I think it had been up two years.

Redirect Examination.

It is what you intend to do after you couple in on to that car, what you would do, as to backing an engine into a car without seeing the end of the cars. If there were fifty-seven box-cars along there, it would require more than the coupling up of an engine to back the car three or four feet.

Recross-examination.

It is all according to how many cars there were in the last cut as to whether or not a string of fifty-seven cars would be moved two or three feet, assuming that *there a* couple of spaces. [88]

Testimony of John Sylvania, for Plaintiff.

My name is John Sylvania; I live at 316 Brandon Street and have lived there ever since 1909; I am a married man and have children. I know where the corner of Second Avenue South and Dawson Street is; there is a path there; it leads to the railroad track and then over to the city dump. I used it quite often. I see other people using it. About a

(Testimony of John Sylvania.)

year ago I was not working, and I was there regularly every day. I saw about fifteen or thirty sometimes using that path, and every time I used it I saw other people using it and crossing the track at that place.

Cross-examination.

I have not used it lately. I used it for hauling wood. I do not use it now because I am working. I have not used it since last spring and summer. I used a wheelbarrow, but I carried the wood on my shoulder across the track there. I left the wheelbarrow on this side and carried the wood over. It was easier for me to carry it over—much easier—than to run the wheelbarrow over the track. It is a little bit hard to get a wheelbarrow across the tracks. There were no boards there to make a crossing, or anything of that kind. When you get across the track there is quite an incline. It is low ground across the track. I think the ground at First Avenue is about level with the track. The track is graded up to quite a height there. I first used the path about two years ago. There was a fence there once. I never went through when the fence was there. I was there when the fence was up, but I never went across. When I got to the fence I used to get my wood under the bridge. I would go down on the trail and then branch off this way to First [89] Avenue and get my wood there.

(Testimony of John Sylvania.)

Redirect Examination.

Last spring and summer I used the path extensively and saw many people. I saw no sign up there.

Testimony of Oscar Adolph Burke, for Plaintiff.

My name is Oscar Adolph Burke; I reside at 5806 First Avenue South; it is about seven blocks from West Dawson Street and Second Avenue; I have lived in that vicinity all my life.

I am familiar with the path that leads from Second Avenue South and Dawson Street north. It runs into that pasture. There are two or three branches of that path in there; one part of it runs over that track there, over to the city garbage dump. It is a well-beaten path. It has been used ever since I remember of. It is about four years since I used it. At that time it was used quite a bit. I used it before they built the fence there and I used it afterwards. I cannot remember exactly how long the fence was up. It was up a short time. Everybody that needed wood down there or anything would use that path. Not everybody living in that vicinity used it; some would buy their wood. I could not say how many used it.

Cross-examination.

The other part of the path went down to the pasture and over the ditch, down there where people kept their cows. I used to keep a couple of horses down there and would have to go down and get them. Not all the people would walk along the

(Testimony of Oscar Adolph Burke.)

path went over the railroad track; some of them did. Some went down to get [90] their cows and some went down to cut Christmas trees. When the fence was up there, I went straight down over the bridge. When the fence was up there was a branch of this path that went down to the trestle, and I went over that road when the fence was up. There is a wagon road through there; I have driven over that road with a horse. It is just a little ways from the railroad. That path is pretty close to the bridge.

Testimony of Ambrose McCoy, for Plaintiff.

My name is A. D. McCoy; I live at 107 West Bennett Street, which is about two blocks from Second Avenue and Dawson Street. I have lived there sixteen years.

There is a path leading from Second Avenue South and Dawson Street north across the railroad track to the city dump. It is a well-beaten path; I have used it. I have seen different people in the path. There has been a path part way; it has been changed several times; there has been a path there ever since we have been there, nearly. There are several places where there are little paths used to go across there; but this path has not been there since the road was there. I used the path ever since I was a boy. There was woods over there, and we used to play over there, and I used it mostly for that.

Cross-examination.

That path over the railroad has not been there as

(Testimony of Ambrose McCoy.)

long as the path that leads into the road. That other one has been there, I believe, I am not sure of it, but about four or five years. I think that within the last four or five years there was a fence built there (the railroad track) for awhile, but I [91] think it was knocked down. It is down now, I know. I might have crossed when the fence was up, but I do not know for sure.

Recross-examination.

There was a path leading over to South Seattle a number of years ago. There is yet, in fact, but it is never used. It was a dike leading over to South Seattle. It was in the vicinity of the path there. The old path was down about a block from where that crosses that railroad track now, and it was a dike, and it went across the railroad track and went across to South Seattle. Track 12 was not there then, but the main tracks were there. The old trail hit the dike about approximately where First Avenue and the tracks meet. They would cross the tracks near First Avenue.

Testimony of Mrs. Bertha Evans, for Plaintiff.

My name is Mrs. Bertha Evans; I reside at 509 Bennett Street, and have lived there twelve years. I knew Edgar Roman for almost two years. He was a very good boy; he helped his father in the garden and always helped on something outside. He helped to clean the yard, and I know he helped this lady clean her yard. He did not sell papers

(Testimony of Anna Jane Roman.)

to my knowledge. I could not say that he made gardens for anybody else. I have seen him delivering washing. I would consider him an industrious boy.

**Testimony of Anna Jane Roman, in Her Own
Behalf.**

My name is Anna Jane Roman; I am the wife of James Roman, and the mother of these seven children mentioned. I [92] was working until I came down here. During the last three or four years Mr. Roman has been quite sick a great deal of the time, about his neck being thrown out of place, and having muscular rheumatism, and he also has been bothered with kidney trouble a good deal. Edgar delivered papers. He brought in \$10 at one time. That was the highest I remember of him bringing in at one time. Several times he brought in \$5 from the paper route, and many times \$2 or \$3 at a time. Then sometimes he went out and hoed gardens, and he quite often went out and mowed lawns, or would run errands to stores for different ladies, and most anything that he could get to do. He always carried the laundry back and forth for me, when I took in laundry. Edgar did most of the gardening, because for almost two years Mr. Roman has been unable to do gardening, especially a year ago this last summer. The last year or so I haven't bought any wood, scarcely at all; Edgar always brought it in. Just previous to his death he was going out on a ranch this last summer at the

(Testimony of Anna Jane Roman.)

rate of \$30 a month and board. He always brought his money straight home and gave it to his father or to myself.

I was working on the 18th of May and returned home about five o'clock. I found my boy hurt very badly. He was in the house on the couch. I did my best to strip him of his clothes. His legs were bleeding terribly. He begged me to relieve him of his pain. I took off his shoes. I cut all the clothing off clear above his knees. They were all stuck with blood, and I tied strings just below the knees, because he was bleeding so bad. I don't remember what time the doctor came. He was taken to the hospital right after the doctor got there. He kept asking me to do something for [93] him to relieve him, because his legs hurt so badly. I was at the hospital most of the time. He suffered a great deal of pain. They had to keep him under morphine or opiates all the time, and they would put him under the influence so much that he would maybe get an hour's rest, he would be more quiet, but he slept very little during the four days and nights and kept moaning and asked me to relieve him of the pain. He died Monday night at 7:30, May 22d.

Cross-examination.

“Q. You knew, from what the boys told you, where he had gotten hurt? A. Yes.

Q. Have you ever been over to the scrap pile, or the place where they got wood, with them?

A. Yes, sir.

(Testimony of Anna Jane Roman.)

Q. Many times?

A. No, not many times; very few times.

Q. Were you ever over there with them when there were cars standing on the track in front of this path that leads up to it? A. Yes, sir.

Q. What would you do then?

A. I could see down the road to the right of me; I could see that that end was clear. There were quite a number of cars down that way, but, on the other hand, I could not see because it went around under the bridge, and I could not see. So I had Edgar and Charley and Clayton all with me, and the wheelbarrow, and I waited there until Edgar went around the end to see how far [94] it was, and see if he could see an engine or anything coming, and then he come back and said that he could not see anything. I could see from the other end, where I stood, so when I could not see anything I had him and his brother Charles get over the couplings, or drawheads, right between the two cars, and I pushed the wheelbarrow under, and they got hold of the wheelbarrow on the other side, and helped to pull it over, and then I had Clayton get over, and then I got over.

Q. Over the couplings?

A. Yes, sir; over the couplings. I climbed up on the ladder that leads up on the side where the brakemen get up on, and then went over.

Q. Did you ever get under the cars?

A. No, I never went under the cars.

(Testimony of Anna Jane Roman.)

Q. Did you on May 24th in a hearing before Dr. Corson, Coroner, in answer to a question put to you by Dr. Corson (page 9), the question being: 'Did Edgar tell you anything about how it happened?' testify as follows: 'Well, he told me as best he could. He was feeling so bad I didn't ask him many questions; but he said that,—he just said that he had been run on to with a car running on to his legs, and hurt him. I didn't ask him very many questions. I had been over there many times with them myself, and I thought perhaps he was doing the same as we had always done, lots of times, went right under the cars, like that, and took the wheelbarrow; but the boys say they were not'?

A. I don't remember what my testimony was to Mr. Corson at all. I can't remember it; I can't recall it. I was asked [95] the next day afterwards, and I could not tell it.

Q. You would not say that you did not say that?

A. I could not say I did, or I didn't say it; I don't remember what my testimony was.

Q. Is that a fact?

A. It is an absolute fact, I can't remember.

Q. Is it a fact that you did often crawl under the cars?

A. No, sir; I never crawled under the cars that I remember of. I crawled between the cars once, but not under the cars,—under the couplings at one time, I crawled under, and two times I went over; all the times I remember of there being cars over that path.

(Testimony of Anna Jane Roman.)

Q. Is it a fact that you stated in this answer to this question that you had been over there with them many times?

A. Yes, sir; I had been over there many times with them.

Q. Did you know that you, nor anyone else, had any right to cross that track?

Mr. BROWN.—I object to that. It implies that they had no right; it is a double question.

The COURT.—Objection sustained.

Q. Do you know that you had no right to go across there?

A. I didn't know but what it was perfectly right for anyone, because there were so many going across there; I supposed it was all right for anyone to go across there.

Q. Did you not, Mrs. Roman, on May 24th, before the Coroner, Dr. Corson, testify as follows: (page 16) in answer to a question put to you by Dr. Corson: 'Do you know anything else, Mrs. Roman, that the jury ought to know about this case?' And did you not testify as follows: [96] 'I don't know, unless it would be to warn people to keep their children away; that is all I know; that is all I know. I might say they are trespassers when they come along here, this place, and the company have to have those to put their cars on.'

A. I don't remember making that statement at all; I don't remember of it.

Q. Will you say that you did not?

A. Well, I don't know that I could hardly say

(Testimony of Anna Jane Roman.)

that I didn't; because I don't remember. I can't remember what my evidence was in that at that time.

Q. Do you remember the next day, that is the 19th or 20th, at the hospital, talking to Mr. Mallett, the man sitting here, in regard to the accident?

A. I remember of him coming up there.

Q. Do you remember saying to him at that time that you realized that it was you or Mr. Roman's fault in letting the children go over there?

A. No, sir; I could not tell you what I said to Mr. Mallett, to save my life.

Q. You would not say you didn't?

A. I could not say I didn't. You would have to ask someone else; I don't remember what I said to him.

Q. Did you not at that time and place say to him, that you knew that the boys were trespassers there?

A. No, I could not say that I said that, or that I didn't say it; I don't remember what I said to him."

Redirect Examination.

The boy died on the 22d and the funeral was on Thursday; [97] he died on Monday and the funeral was on Thursday. The inquest was held on the day before he was buried.

Testimony of Charles Roman, in His Own Behalf (Recalled).

I remember the day after the accident going down to the yard with Mr. McGraw and Mr. An-

(Testimony of Charles Roman.)

derson, two railroad men, to show them where the accident happened. I remember their asking me why I did not come to them for help. I did not say that I was afraid to ask any of the railroad men for help. I did not say that I didn't have any right on the track. I didn't say that I was afraid to come through the upper end of the yards, because the railroad company would not let me.

"Mr. JONES.—Your Honor, I have a motion at this time.

The COURT.—The jury will be excused, and remain on this floor, in the corridor, within the call of the bailiff.

(Jury excused from courtroom.)

Mr. JONES.—Comes now the defendant and challenges the sufficiency of the evidence, and moves the Court for a nonsuit, and for judgment of dismissal of the two actions herein, upon the grounds and for the reasons, that there is a material variance between plaintiffs' complaints and the proof thereof, and that the evidence offered by plaintiffs fails to show any negligence on the part of defendant sufficient to entitle the plaintiffs to recover herein, and that the plaintiffs' evidence established that the decedent, Edgar Roman's injuries, [98] were caused solely by his own negligent acts and omissions, which directly contributed thereto, and by the negligent acts and omissions of the plaintiffs, the father and mother, which directly contributed thereto.

(Argument by Mr. Jones.)

The COURT.—There seems to be on your motion

(Testimony of E. R. Perry.)

two questions; the first question is, does the evidence show indisputably that the deceased was a trespasser? If he was a trespasser there is no evidence of negligence; that is the first point in the case. But under the plaintiffs' evidence regarding this path used by the public, and obstructed by the car, the Court finds a simply leaving *on* the path for a few feet, to go around the car, that was obstructing the path, it didn't make the deceased a trespasser.

On the other question left upon your motion, is whether the deceased was shown to have been guilty of contributory negligence, or his parents, were shown to have been guilty of contributory negligence, for whose benefit he was working. The doctrine, of course, generally is, that questions of contributory negligence are questions for the jury to decide, under all the evidence, and not for the Court to decide, and certainly there is not here made out such a conclusive case of contributory negligence on either the part of the parents, or on part of the deceased, to warrant the Court in taking the case from the jury. The motion is denied.

Mr. JONES.—Let the record show an exception.

The COURT.—Exception allowed." [99]

Testimony of E. R. Perry, for Defendant.

My name is E. R. Perry; I am a court reporter; I reported the testimony of the witnesses at an inquest held on May 24th, 1922, on an accident in the yards of the O.-W. R. & N. Railroad. I took down the testimony of all the witnesses at that time.

(Testimony of E. R. Perry.)

“Q. I will ask you to turn to the testimony of Anna J. Roman, and I will ask you if you find this question: ‘Did Edgar tell you anything about how it happened?’ A. Yes, sir.

Q. Just read to the jury what the answer to that question was.

A. (Reading:) ‘Well, he told me as best he could,—he was feeling so bad I didn’t ask him very many questions—he just said that the train ran to him, that the train ran on to his legs, and I didn’t ask very many questions. I had been over there many times with them myself, and I thought perhaps he had did the same as he had always done lots of times, went right under the cars like that, and took the wheelbarrow; but he says that they were not some of the cars there; there is a big long string, and there will be a small opening between sometimes, and they will be put together.’

Q. I will ask you to turn to the testimony of—I think it is the last bit of testimony in the transcript, where you will find this question by the Doctor again: ‘Do you know anything else, Mrs. Roman, that the jury ought to know about this case?’ And state what the answer is.

A. (Reading:) ‘I don’t know, unless it would be to warn people to keep their children away. That is all I know; that is [100] all I know. I might say they are trespassers when they come along here; this belongs to the company, and they have to have this to put their cars on; that is all I know.’ ”

(Testimony of E. R. Perry.)

Cross-examination.

She was much agitated at that time. As I understand, it was before Edgar was buried, about two days after his death. As I remember she was much agitated. Of course, I could not see the way she was illustrating, because I was busy writing. She was standing there, I imagine, pointing to what she meant, but I could not see her. All I know is what she said. I did not see her motions at all. She testified as I have read.

Testimony of Cornelius Hageman, for Defendant.

I live in West Seattle; I am a civil engineer. I was employed by the Oregon & Washington Railway Company from January, 1911, to 1919. I am not now in the employ of the railroad company. I am superintendent for J. A. McEachern Company, a contracting company. We are building the First Avenue trestle, which crosses railroad track No. 12. I am acquainted with track 12. I help construct same. It was built in 1913. It is used principally for the storage of stock cars and cleaning stock cars. It is used a great deal; you might say continuously. The ground on both sides of the track is partly a marsh, "tule" marsh, I guess you would call it on both sides of the track, excepting a part of it is filled with the garbage dump. The garbage dump would be right out from First Avenue. I never noticed any trail that crosses this (dump) part of the property. I do not know of any trail across the track at that place. In [101] the

(Testimony of Cornelius Hageman.)

spring of 1916 we built a fence around the entire yard. That fence on the south side of the track extends all the way from the trestle to the intersection of Colorado Avenue. It is built right on the right of way line. There is a ditch on the outside of the fence; it is not on the company's property. I worked for the company until 1919. I was frequently down in the yards at this place. I took charge of the building, completing the yards in 1912. They were being constructed from 1910 until about 1913. I had charge of the construction of the yards and the shops. I was down in the yards very frequently until the time I left. I was not aware of any place that the public were continuously and notoriously using crossing the track in the yards. No such place was ever brought to my attention.

Cross-examination.

I am a civil engineer. I laid track 12. Mr. Barr, the yardmaster, had nothing to do with the building of the tracks at all. I was under G. R. Hohlman, chief engineer. I was on the ground; I would be out there maybe once or twice a day. I am unable to tell you the length of track 12, because it is too long for me to remember. I never heard of any path crossing track 12 and I never saw it. Track 12 was built in sections. We built numerous tracks during that same period. We built the track on through, and connected with the N. P. at Duwamish Avenue. There are no paths crossing that track. There is a street crossing it—East

(Testimony of Cornelius Hageman.)

Marginal Way crosses it, and a track crossing above First Avenue South. There are no paths along there. It is a continuation of the same track going out on Harbor Island where the Duthie Shipyard used to be. That track is a mile long from the connection of the N. P. end. Spokane Street crosses that track; it is one block from the water. [102] There is a street the full length of the track. There is swamp land west of tracks 12 and 13. I am unable to tell you who maintains the ditch. That is not on the company's property, that runs along the east side of track 12. There is a ditch there; I do not think it was dug for the purpose of protecting the track. I imagine it is constructed for drainage purposes. It was not constructed for the purpose of protecting that embankment. The track where the refuse is thrown is a long distance from the ditch. That is not a movable track. They could move it.

Redirect Examination.

I did not say they did it; they could do it. I don't know whether they did it or not.

Recross-examination.

I did not construct the ditch; I had nothing to do with the ditch. There is swamp land on both sides of that track. You would not necessarily make allowance for a ditch for the purpose of protecting the track; you can make a fill. The fill of that track is not caused by refuse being thrown out of the cars. The fill was made with the hauling of

(Testimony of Cornelius Hageman.)

dirt from Renton. I never saw any lumber taken off the cars and thrown on the right of way. I am down there every day. I was down there at one o'clock today. I was working right off track 12 unloading lumber. I do want to tell the jury to-day that there is no path across track 12.

Testimony of J. L. St. Onge, for Defendant.

My name is J. L. St. Onge; my business is bridge and building foreman for the O.-W. R. & N. I have instructions to [103] build and repair fences. The fence along track No. 12 on the west or south side of it, was repaired by my orders at various times. That was during the years 1917, 1918 and 1919. Some of the men I sent to repair the fence were George Nicholson, Henry Halvorson and Louis Matthewson.

Cross-examination.

My territory extends mostly between Seattle and Tacoma. I repaired the fence during the war. It was a war measure.

Testimony of W. W. Finch, for Defendant.

My name is W. W. Finch; I am Superintendent of the King County Home; I live right there. I was employed as watchman in the yards of the Oregon and Washington Railway at Argo in 1916. I know where track 12 is. It was a part of my duty to keep people out of this yard from First Avenue on down to Argo. I performed that duty as a watchman. I had occasion at times to oust people

(Testimony of W. W. Finch.)

from the yards. There was no particular point along track 12 that people were in the habit of trespassing.

Cross-examination.

I believe that 1916 was the only year I was there. The Argo Yards run away north of First Avenue and from there clear down to Argo Station. My beat ran clear away down there north of the First Avenue trestle and ended at what we call along 11 and 12. I started from the Argo yards. I went from the north end clear through to the Argo crossing. I went along both sides, from fence to fence. My hours were from seven to seven in the daytime. I know where track 12 is. I don't know where any path crosses track 12. I know where the dump or scrap heap is. I don't know of any path across there. The big dump heap is on the [104] outside. People came into the dump heap on the First Avenue road. There was a plank road off of First Avenue, and they went down there and made a circle down to the dump heap. I don't know of any path leading across track 12 south of the scrap iron dump.

Testimony of Henry Matthewson, for Defendant.

My name is Henry Matthewson; I am a carpenter, working for the O.-W. R. & N. under Mr. St. Onge. We repair fences and anything that comes under that department. I know where track 12 in the Argo Yards is located. I remember a fence along the south or west side of track 12. At various times

(Testimony of Henry Matthewson.)

I repaired the fence from the First Avenue trestle on down toward Argo. We repaired the whole fence from the Argo crossing on the east side of the yards and went over on the west side and followed up to the machine shop. We repaired it all along. The last time was the latter part of June of this year. We have been repairing it at various times for the past four or five years.

Cross-examination.

We repaired the fence on both sides of the yard. I know where track 12 is. We have repaired the fence where the well-beaten path crosses track 12. I know where the dump is. I have not seen people on the path. There is no path crossing the yard. The dike is north of the garbage dump. There is no dike on the east side of track 12. Track 12 is on the west side of the yard. There is a ditch along the west side of track 12. There are two planks over the ditch. There is no path. I have seen the plank there; there is a fence there, you know. I never had any orders from the railroad company to kick those planks into the ditch. [105]

Redirect Examination.

I do not know whether or not the fence is built on the line.

Testimony of George Nicholson, for Defendant.

My name is George Nicholson; I am a carpenter working for the O.-W. R. & N. under Mr. St. Onge. I have had occasion to repair the fence along the west side of track No. 12 in the Argo Yards, from

(Testimony of George Nicholson.)

the First Avenue trestle on the south to the Argo Station. The last time I did it was in July of this year. In 1917 and the fore part of 1918 we repaired it quite often.

Cross-examination.

That was during war times. In July, 1922, after the boy was run over, was the last time I repaired it. The fence was leaning over pretty bad right at this path. At the north path the fence was down. We did not repair it where was it was down. As I remember right, this (fence) was not clear down at the path. There was a hole right at the path. We fixed that hole. I did not see any people using it. Plaintiff's Exhibit 2 shows the planks that crossed the ditch. I could not show the fence here (on Exhibit 2) because the fence should be in here (indicating).

Testimony of Henry C. Halverson, for Defendant.

My name is Henry C. Halverson; I am a carpenter, working for the Oregon and Washington Railroad. I know where the fence is along the right side of track 12 in the Argo Yards. I have repaired it at various times during the last three or [106] four years. I have repaired it all the way from the trestle where it crosses First Avenue on the north to Argo Station.

Cross-examination.

I am still working for the same company. My territory is from Seattle to Tacoma. I cannot say exactly the last time I repaired the fence, but about

(Testimony of Henry C. Halverson.)

a year ago; there are several of us, and they do not send the same one all the time. Mr. Nicholson was not with me the last time I was there. As far as I recall it was a fellow by the name of Wright. I don't know that there is any path crosses track 12. There is a kind of a path up to it. There is a fence to the north of the path clear to the trestle. It has been there every time that I was down there. I have been there a number of times during the last seven years, and there has always been a fence along there.

Redirect Examination.

At the point of this path there was always a fence there and I have had occasion to repair the same.

Testimony of M. R. Pomeroy, for Defendant.

My name is M. R. Pomeroy; I am a special officer for the O.-W. R. & N. Company; have been working as such for a little over two years. I know track 12 belonging to the company in the Argo Yards. At track 12 there is a ditch on the outside of the fence. I suppose the company's property extends to the fence. The ditch is on the other side of the fence. I have seen some planks across that ditch about four or five hundred feet from First Avenue. I have gone down a good many times and thrown them in the ditch to keep people from coming in there. [107] There is no path crossing track 12. Whenever I found anybody in the yards that did not belong to the company, I ordered them out. There is no place in the yard or on track 12 where it

(Testimony of M. R. Pomeroy.)

was commonly and notoriously used by people to cross.

Cross-examination.

I have been with the company for two years. Previous to that I was in the fish business in Alaska. I moved to Seattle on the first of September, 1917, from Astoria, Oregon. I was born in Oregon; was sheriff of Clatsop County, and after I went out of office I went into the insurance business. I never worked for a railroad company before. My duties are to look after the company's property and take care of it. I cover all the company's property located in Seattle. I went to work for the company November 7th, 1920. When I first went to work for the O. & W. I was working on the night shift in the Argo yards continuously. I was in the yard every night. I would arrive there practically between six and seven and I never left until 5:25 in the morning. I worked every night from the 7th of November, 1920, until the 11th of January, 1922. My main duties were to protect all property.

Testimony of J. F. Powell, for Defendant.

My name is J. F. Powell; I was night watchman in the employ of the Oregon & Washington Railroad in the winter of 1914 and 1915. I was stationed at Argo, and had occasion to watch the tracks from First Avenue clear to Argo. I know track 12. I had occasion to put people out of the yard. I know of no place on track 12 that was open, notorious and common in crossing. [108]

(Testimony of J. F. Powell.)

Cross-examination.

I worked from 1914 and 1915—from October until February. I went to work at 6:00 o'clock and quit at 5:30 in the morning. My duties were to watch the cars and property. I went all over the yards. I have seen loads on track 12 other than manure. We always went over that track. I could tell whether or not there was merchandise in the cars on track 12 by their being sealed. I knew the general use of this track—that it was for empty cars and for cleaning cars. I have seen loads over on that track. I am not mistaken as to the track. The Argo Yard must be at least a half a mile long. It being sometime ago, I may be mistaken as to loads.

Testimony of James A. Hendricks, for Defendant.

My name is James A. Hendricks; I am an engineer working for the Oregon & Washington Railway. I was working for that company on the 18th of May, 1922, and went to work at four o'clock at that time. We had occasion to shove in one car on track 12 on that day. It was about fifteen minutes after I went to work. We put this car or cars, not over two, right on 12. We shoved it in the clear. I could not say how many cars were on track 12 at that time; I should judge forty or fifty. We were just shoving that car in the clear, that is all. We had hold of that car, and we had to put it in the clear, and we had to shove it in a little bit to get in the clear of No. 11. There

(Testimony of James A. Hendricks.)

never was any pathway or track known to me crossing track No. 12 between First Avenue and Argo Station. The track is all fenced in. The only passage I know of is up at the roundhouse where there is a gate. Right through the roundhouse there is a gate; the only entrance there is through the yard. [109] The roundhouse is about five blocks from First Avenue. That is the only way they could get in there that I know of. There is a big high fence, and a fellow would not crawl through that, that I could see.

Cross-examination.

I live on Queen Anne Hill, and have lived in Seattle thirty-six years. Have been an engineer twenty-two years. Have been stationed at Argo Yards practically all the time. During all that time I have been operating on track 12. I operate all over the yard. This time I was operating at night time. You change off when the seniority comes to you. I worked there when Mr. Barr was yardmaster. We always got instructions to be careful, because they used that (No. 12) as a dump track. In yard service we move cars anywhere in the yard there, without knowing and seeing the end car. There is no path there (on No. 12). I have been all over the track; there is no path there at all. I should judge that the last box-car before we moved it on track 12 was about a car length from the switch. I got signals to shove it in. I get signals from the switchman to do my work. I do not re-

(Testimony of James A. Hendricks.)

call exactly where Mr. George was at the time the car was moved, but I saw him; I could see him plain. He was standing on the ground, not over a car length from the engine. The three men were not on the ground together, one of them was on the footboard making a coupling, and the other fellow was back by the car making a coupling. I think I was getting my signals from Mr. George. He was foreman of the switchmen and the one that gives the signals. None of the men were near the car that struck the boy. The boy was struck, I should judge, forty cars away from the engine. One man was between the engine and the car [110] on the footboard. The other man was making a coupling in back of the car. They could not see around the curve on track No. 12. The cars would be pretty well around the curve. There was no watchman or switchman on top of the box-cars as we went into this track; there never is. We never have a watchman or switchman on top of cars shoved into a track.

Redirect Examination.

There is no rule requiring a man in the yard there on top of the car. Track 12 is used very frequently. We might use it two or three times in fifteen minutes, and we might use it once in an hour. It is used a hundred times a day.

Recross-examination.

We might go in in fifteen minutes afterwards and pull the whole track out; you cannot tell. I was in

(Testimony of James A. Hendricks.)

there yesterday afternoon twice, and pulled out the whole track. There were fourteen cars in there yesterday. We would not go in there unless there are cars there. I would have nothing to go for. I have shoved cars in there and there would not be any on the track at all. When there are cuts in the train we always shove back easy and they make their own couplings. There is practically always cuts in the string of cars. In order to discover whether or not they are coupled, we will take a pull on them, and if they are all coming we take them out; if they don't all come, we go back and get the rest. I used track 12 at the time of this accident just as I have used it a thousand times.

Testimony of Joseph A. George, for Defendant.

My name is Joseph A. George; I testified yesterday for the plaintiff. At the time of the accident I was engine foreman [111] and am still engine foreman. I remember the day of the accident. That was my first move when I went to work about 4:00 o'clock, was to shove that car in on track 12. We were shoving in just one. We were doing it as we had done it on several other occasions. That is an every-day occurrence. There is no rule of the company requiring a man on the rear end in the yards. There are no crossings over track 12 between First Avenue and Argo Station. I have been working on track 12 ever since it was built. There was no occasion previous to this case of anyone being bumped into since the track was built.

(Testimony of Joseph A. George.)

Cross-examination.

I was on the ground when the engine pushed that car in there. One of the men was on the footboard, and the other made a coupling on the stock cars. We were within a car length of each other. There were fifty-seven cars on the track. The Coroner's inquest was not held on the path; it was held where the boy was hurt. The inquest was about half over when I got there. I don't know anything about a path there. I never got down there to see if there was any path, because there is a fence there. We did not kick those cars in.

Testimony of Peter J. McGraw, for Defendant.

I am the same man that testified yesterday. I am the Yardmaster at Argo. I was on duty on May 18th, 1922, at the time of the accident. The crew was pushing in some cars there to be cleaned. There is, to my knowledge, no track or pathway across track 12 between First Avenue and the roundhouse. I have been at the Argo Yards since 1909, since before track 12 was built, and I have been there ever since. I first learned of [112] the accident the next morning. I was down to the scene of the accident the next day with Mr. Anderson and the little boy, Charles Roman, brother of the boy that was injured. He indicated to us the place where the accident happened. Mr. Anderson and I asked him at that time why he did not come to the railroad men for help. He said he was afraid to go up that way because he had no business on the

(Testimony of Peter J. McGraw.)

track. He said he came in there to get some wood. We asked him why he did not go around by the roundhouse and go to the dump. He said that they won't let him in there that way. He said his mother and father sent him there. On that day the boy took us out to the track on the trail he had taken the day before. There was an old plank laying across the ditch; there was only one plank. The boy indicated to us the place where his brother was injured, about 15 feet north of path leading to track. There is no rule of the company requiring anyone at the back of these fifty-seven cars on that day. I know the rule of the company in that regard; it is Rule 103.

"Mr. JONES.—Is there any objection to reading that into the record, instead of putting the book into the record?

Mr. BROWN.—I object. * * *

The COURT.—Objection overruled.

Mr. JONES.—(Reading:) "Rule 103. Oregon Washington Railway & Navigation Company, in regard to handling cars on tracks.

When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the front of the leading car." [113]

Cross-examination.

There was a path up to the ditch. There were no paths whatever across the track or on the other side of the track. No one came to get wood and scrap-iron at the dump over this path that I know

(Testimony of Peter J. McGraw.)

of. I testified before the coroner's jury. In testifying as to the trail, it was that trail that goes to the left of the dump since they put the fence up. I didn't state that they crossed the track. There is no footpath on the other side of track 12. I was referring to the footpath to the ditch; it follows on the left-hand side to the dump. The dump is on the other side of track 12, but they go up and go around. They go clear up by the bridge and around in there to the city dump. At the inquest they were talking about the path leading to the ditch; that path had been there quite awhile. I knew of the path that lead to the left. The man Anderson who was with me is the roundhouse foreman. We went there the next day with the little boy. It was just rumored that somebody got hurt. We had quite a time to find out. We went to the hospital. At last we found this boy at school. We went to the schoolhouse, got Charles Roman, and asked him to come along and show us where the boy got hurt. We went to the hospital first. We did not talk to Edgar Roman; the nurse was there. What I said at the investigation was true, unless they got that wrong. I was telling the truth before the coroner's inquest. We heard the statement that he made. We did not go there to get a statement; we went there to find out how the boy got hurt. Nobody knew; we could not find out anything at all. We did not know whether he got hurt by the Northern Pacific or the Great Northern. There were twenty tracks down there. I did not know where he lived.

(Testimony of Peter J. McGraw.)

As soon as we found out where he lived, we went there. I think it was after we went [114] to the hospital. You could go to the dump through the gate at the roundhouse and go right down there. There is a gate there. You could go in and go down the track. You can go down the track without going to the roundhouse.

“Q. Didn’t you make this statement, a juror asked you: ‘Is there any signs along here where it says, “No trespassing”?’ and you said ‘No.’ ‘You say the fence has been knocked down?

A. Yes sir, they threw dirt along here, and they knocked it over, kept throwing dirt over there.

Q. How long has this footpath been there?

A. I could not say, Doctor, but it has been quite a while.

Q. Is there any crossing there?

A. There is no crossing there, but that used to be an old trail across through there. Now they changed it and put it across here; they moved it up.’ Did you testify to that?

A. That trail that goes to the left, to the dump, since they put the fence up.

Q. ‘They come through this path and they cross the track,’ and then you stated—

A. No, sir; I didn’t state it, that they crossed the track, no, sir.

Q. ‘How long has this footpath been there.’ What footpath have you reference to, on which side of the track? A. On the left-hand side.

Q. Going up the track?

(Testimony of Peter J. McGraw.)

A. No, sir; it goes to the dump.

Q. Which footpath do you have reference to; on this side of track 12, or on that side?

A. There is no footpath on the other side of track 12.

Q. Then you have reference to a footpath there, to this path that came to the plank?

A. Yes, sir; to the ditch.

Q. That is what you are speaking of?

A. Yes, sir; it follows on the left-hand side to the dump.

Q. You would have to cross the track, in order to get to the dump? A. No, sir.

Q. Which side of track 12 is the dump?

A. It is on the other side, but they go up and go around.

Q. Then they asked you, 'Is there any crossing there?'

A. There is no crossing there. That used to be an old trail across through there. Now they changed it and put it across here; they moved it up.

Q. Who put this path over here?

A. Why I suppose the people from the dump to 'pick up stuff.' Did you so testify?

A. If it is in there I did; yes, sir.

Q. Didn't you talk to him? A. No, sir.

Q. You didn't talk to him?

A. No, sir; the nurse was there.

Q. You went to the County Hospital. (Reading:)
'We went to the County Hospital and got the statement from Edgar Roman, and he told us that his

(Testimony of Peter J. McGraw.)

little brother was along with him at the time'; Did you make that statement before the coroner's jury? [115]

A. If it is there I did; yes, sir.

Q. If it is there that is true, is it? A. Yes, sir.

Q. And you are mistaken when you testify, 'We didn't interview him'?

A. The nurse—what does it say down there? Does it say about the nurse?

Q. Let's find out. You were asked by the coroner? Q. You discovered at 9:30 the next morning, of what day? A. It would be the morning of the 19th. Q. The morning of the 19th, which was the next day? A. Yes, sir. Q. You went to the County Hospital? A. We went to the County Hospital and got the statement from Edgar Roman, and he told me that his little brother was along with him at the time. Q. His little brother George? A. He said that he and his brother was down there, going over to the dump to get some wood, and that they had a wheelbarrow trying to push it across the track, and the cars moved, and they said the wheel ran over on his legs, and then fell back again. Is that correct? A. Yes, sir."

Redirect Examination.

The Romans live much nearer to the roundhouse, and it would be shorter and more convenient for them to go down the track by the roundhouse than it would to go around over this path.

(Testimony of Peter J. McGraw.)

Recross-examination.

One would be able to wheel a wheelbarrow down the track from the roundhouse. One could go along the middle of the track.

Testimony of Fred S. Anderson, for Defendant.

My name is Fred S. Anderson; I am mechanical foreman for the O.-W. R. & N. Company. I have worked for them three years last June, and was in their employ on the 19th of May, 1922. On May 19th I accompanied Mr. McGraw and Charles Roman along the path shown to us by Charles to track 12. Charles showed us where the accident happened. We inquired of him at that time why he did not come to the railroad men for help. He said he was afraid to go down there, because he did not know that he was allowed there, and he did not want anyone to know that his brother was injured. We asked him why he did not go down the track from the roundhouse rather than to go around on this trail. It would have been much closer to have gone by the roundhouse. He said he was not permitted to go through that way. On that morning there was one [116] plank across the ditch over the right of way.

Cross-examination.

He told me that he had used that path to gather wood from the dump. He did not mention other people using it, to my knowledge. It did not enter into my mind that other people were using it at all; I did not inquire as to that. I have been down

(Testimony of Fred S. Anderson.)

there three years and a half. I went over to the hospital. I got no statement from Edgar Roman. We did not talk to him on account of his serious condition. I asked him how he felt; that is about all. He said he met with an accident with the wheelbarrow; that is about all he could tell. He did not mention how it happened at all.

Testimony of C. P. Hatton, for Defendant.

My name is C. P. Hatton; I am employed as switchman for the O.-W. R. & N. Company in the Yargo Yards, and was working as such on the 18th of May, 1922. I went to work at four P. M. At about that time I was working on switch track 12. Shortly after we came to work, we had hold of—I don't recall—a matter of two or three cars, and we were going to shove them in on this No. 12 track. The cars were up very close to, if not, foul of No. 11 track, and this No. 12 track, at the time there were quite a number of cars on it, and we wanted to shove them down far enough to clear No. 11 track so as to go in there. We had cars to go in there and cars to get out, and I rode this lead car down that way that we had pushed up with the engine, made the couplings; and the foreman and assistant yardmaster on duty at the time gave the signal to take up the length of distance that they figured was room enough, that they needed to hold those cars. I coupled up and saw that the coupling was made. [117]

(Testimony of C. P. Hatton.)

Cross-examination.

I do not recall whether there were two or three cars attached to the engine. I recall the facts and circumstances because we talked about it the next day before we went to work. We just discussed this matter of what time we were in on this 12. We did not kick those cars in there. We could not kick them in because the cars were up too close. Those that were on the track were either afoul of 11 that they had to go in. It is not negligence for a car to be afoul of track 11.

Testimony of Fred W. Mallett, for Defendant.

My name is Fred W. Mallett; I am District Claim Agent for the Oregon and Washington Railway Company. On hearing of any accident it is my duty to get out and investigate the circumstances of the case. I heard the testimony of Mr. and Mrs. Roman. I talked with them a few days after this accident. It was about the 22d of May, previous to the boy's death. On that day they both admitted to me that they knew that the boys were trespassers on the road at the time of the accident. They both said at that time that they knew it was their own fault in allowing the boys to go upon the road.

Cross-examination.

I found both Mr. and Mrs. Roman at the hospital. I did not know that the boy was dying. They were not in the room with the boy at the time I saw them. The man seemed a little more affected than the

(Testimony of Fred W. Mallett.)

mother. The mother very willingly and voluntarily gave me the information. I told them who I was. I told them I was claim agent for the Oregon & Washington Railway. I did not tell them the purpose of my visit. I did not tell them [118] that anything they said that was against them I would testify to. I have been an investigator for thirteen years.

Testimony closed.

“Mr. JONES.—I have a motion, if your Honor please.

The COURT.—The jury will retire from the room, and remain on call.

(Jury leaves courtroom.)

Mr. JONES.—If your Honor please, in order to preserve the record, I want to make a motion at this time.

Comes now the defendant and moves the Court for a directed verdict for the defendant in the two cases pending, on the ground, and for the reason that the evidence in these cases does not show any negligence on the part of defendant sufficient to entitle plaintiffs to recover herein, and that the evidence establishes that the decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which directly contributed thereto, and negligent acts and omissions of plaintiffs, the father and mother, which directly contributed thereto, the father, as administrator in one

suit, and the father and mother in their personal capacity in the other suit.

(Arguments.)

The COURT.—The motion is denied. But I want to call your attention to the fact that since the amendment, the amended complaint in 7018, that the paragraphs were renumbered, and allow your answer to stand as made by the original complaint, and applying it to the amended complaint you admit in paragraph V. Paragraph V of the [119] amended complaint is the allegation of the path. Of course paragraph V of the original complaint is now paragraph IV, as I understand it.

Mr. JONES.—I move the Court that the record show that the answer of defendant denies paragraph V of the complaint.

The COURT.—The record may show.

Mr. JONES.—Let the record show that an exception be allowed defendant to the Court's ruling denying the motion.

The COURT.—Exception allowed.

Instructions of Court to the Jury.

“The COURT.—Gentlemen: You have listened to the evidence and the arguments in the case; all that remains to be done before you retire to make up your verdict, is for the Court to instruct you on the law.

As you have gathered from the beginning in this case, there are two cases being tried to one jury. That may seem, under the evidence in these cases, difficult for you to understand, and a word of ex-

planation by the Court is not out of place. There is, in common law, no right to recover in damages on account of anyone's death. There is no right to recover unless the statute gives it; and there are two statutes of the State of Washington that have allowed recovery where the facts warrant it, to parents where a child has been killed. One provides that the administrator of the deceased child, where there are parents living dependent on the child for support, that an action may be maintained by the administrator to recover such damages as are just under all the circumstances of the case. [120]

There is another statute that provides that if a child dies on account of his injuries, and has suffered pain, that that right of action does not end with his death, but that it lives, the parents who are dependent on him for support, those parents may sue and recover what he could have recovered under that right of action. You will, of course, understand that so far as that pain and suffering is concerned, that it is the pain and suffering that the deceased endured between the time of his injuries and his death. Since in the one case the administrator is the party to sue, and in the other case the parents are the parties only who can sue, that is the occasion for there being two lawsuits here instead of one. Although in the one case it comes back to the support of which the parents have been deprived by his death, and in the other case it goes to the compensation, if any to be rendered, on ac-

count of pain and suffering that the deceased had endured before his death.

The plaintiffs' complaint in each action in this case alleges, that there was a footpath or way or road across the tracks of the defendant company in the south part of the city; that it had long been used, that the defendant knew about it, and that this deceased boy, in crossing that railroad, over that footpath, was injured and subsequently died from the injuries he received. That the defendant was negligent in that there was no one on or about the cars that ran against him, upon him, and injured him; and that no alarm was given, or warning that the cars were moving; and then alleges the damages on account of the injury and death.

Defendant comes into court and denies that there was any path there, and denies that it had any knowledge of any [121] path or road, and denies that it was negligent in any way; and then sets up as an affirmative defense in each case, that there was no path, and that the deceased was a trespasser, and had no right to be at the point where he was injured, had no right to be there. It further sets up that his injuries were occasioned by his own contributory negligence, and that the parents themselves, for whose benefit these suits are brought, were guilty of contributory negligence in allowing the boy to be there.

The plaintiffs then, by their reply, deny these affirmative defenses, which the defendant has set up; that is, they deny that the deceased was wrongfully where he was, and deny that he was a trespasser,

deny that he himself was negligent, and deny that the parents were negligent. These are the issues that you are called upon to try.

The first is the matter of this path that has been testified concerning. It is possible that if there has been notorious, hostile, adverse and continuous use of a pathway or road, that a right may be built up upon the part of the public, that is, an adverse right. But, as I understand the evidence in this case, and the arguments of counsel, that is not the contention of the plaintiffs. The contention of the plaintiffs is, that the deceased was what is known in law as a licensee; that is, that the railroad, by its conduct, had given permission to the deceased as one of the public, to use this pathway until such time as the railroad set its foot down and put a stop to it. It is the law that if a railroad or any other person who owns land, with knowledge that it is being used for a certain purpose, say for a foot-path, permits it impliedly or expressly,—permits [122] the continued use of it for that purpose, that one so using it is not a trespasser.

Regarding the railroad's duty to a trespasser, the Court instructs you, that the railroad in the operation of its trains, has, in the absence of knowledge that a particular individual is in danger from the operation of its trains, a right to operate them on the assumption that other people are obeying the law, that no one is trespassing on its tracks. Of course, if the man operating the train see the person on the track, this rule does not apply; but, in the absence of knowledge that any one is in danger

on the tracks, they have a right to run their trains, taking for granted that no one is trespassing in a place of danger. So far as a trespasser is concerned, a railroad company in operating its trains, would only be liable if it were grossly negligent. A person is grossly negligent when he fails to exercise even slight care.

The rule where a person is a licensee, where there is an implied consent on the part of the defendant railway company to the deceased, as a member of the public, he might use this footpath as a footpath until the railroad company saw fit to put a stop to it; so far as the defendant company's duty to such person is concerned, the law requires of the railroad company that it exercise ordinary care.

Ordinary care is the care that an ordinary careful and prudent person would exercise under like circumstances, from time to time, and should always be proportioned to the peril and danger reasonably to be apprehended from the want of proper prudence. [123]

Now, the peril and danger reasonably to be apprehended from a want of proper prudence,—one of the circumstances that would be taken into account in determining what ordinary care would be, would be the extent to which such a footpath was used, if at all, and, if the defendant company had knowledge of its use.

Regarding the burden of showing, by a fair preponderance of the evidence, the disputed allegations in the complaint, rests upon the plaintiffs; that is, they must show by a fair preponderance of the evi-

dence, unless the defendant was guilty of gross negligence, as I have defined it to you,—the plaintiffs would have to show by a fair preponderance of the evidence,—and this extends to the use,—of the existence and use of the footpath so used by knowledge of the defendant. They would have to show by a fair preponderance of the evidence the negligence in at least one of the particulars which is alleged in the complaint; that is, the negligence of the defendant; they would have to establish by the evidence the amount of damage owing to the injury; they would have to show that the negligence of the defendant was the proximate cause of the deceased's injury and damage.

Regarding these defenses that have been interposed, the affirmative defenses, that the deceased himself was guilty of contributory negligence, and that the parents were guilty of contributory negligence, the burden of establishing by a fair preponderance of the evidence those defenses, rests upon the defendant.

The deceased was bound to exercise ordinary [124] care for his own safety in crossing the tracks of the defendant company. In determining whether he exercised ordinary care you will understand that means the ordinary care to be reasonably expected from a boy of his age, experience and understanding, under the same circumstances. If he failed to exercise ordinary care for his own safety, and that failure to exercise ordinary care on his part, was the direct, proximate cause of his

injury and damage, and without that failure on his part to exercise ordinary care, he would not have been injured, then the plaintiffs in neither case can recover, and your verdict would be for the defendant. Likewise, the deceased's parents, in their control of the deceased boy, they were bound to exercise ordinary care for his safety; that is, they were bound to exercise that degree of care and prudence that parents would ordinarily exercise in the control and direction of a child of the age, understanding and experience of the deceased. If they failed to exercise that degree of care for his control and direction, and that failure on their part to exercise that degree of care was the proximate cause of his injuries and death, then there can be no recovery in either case; that is, if the parents, or either of them, failed to exercise that degree of care, there can be no recovery in either action.

The Court has used the expression 'proximate cause.' Proximate cause is that cause that directly produces a result; the moving efficient cause, that cause, which moving in a continuous sequence uninterrupted by any new and efficient cause produces a result.

I have been asked to give certain written instructions, and I may have neglected to cover the ground [125] covered by the written instructions, for that reason I will read some of them. Do not take for granted where there is a repetition in the written instructions covering the same points, that I have covered in the oral instructions, that the Court deems it of any more importance than the other

instructions where there is no such repetition. You will understand that all the instructions that I am giving you apply to both cases, unless I have particularly pointed out where an instruction applies to only one of these cases.

The Court instructs the jury that, if it has been shown by the evidence that the plaintiffs' son, Edgar Roman, was guilty of any act of negligence which directly contributed to his injury, that is, was guilty of want of ordinary care,—that is, the ordinary care of a boy of his age, intelligence and experience under the same circumstances, whether it was because of some act that such an ordinarily careful and prudent boy would not have done or the omission to do that which an ordinarily careful and prudent boy would have done, under the circumstances, and such want of ordinary care contributed to the accident, and without it the accident would not have occurred, then you should go no further, and fix the amount of recovery. The boy's contributory negligence in such case defeats recovery, and your verdict must be for the defendant, even though you find the defendant to have been also guilty of negligence.

The Court instructs you that the defendant had the unobstructed use of its tracks in its yard in the city of Seattle for the passage of its switching engines and cars, and for the storage of same; that unless you believe from the evidence that there had prior to the time of the accident, [126] been such common, notorious and habitual use of its yards at the place in said yards where the accident oc-

curred, as a path or footway by the public, that the defendant would, in the exercise of ordinary care have had knowledge thereof, then there was no obligation upon the defendant as to the decedent to keep a lookout for him, to discover his peril, if he was in a perilous position.

The Court instructs you that, it is not to be inferred from the slight circumstances that a railway company has granted to the public the joint use of its switch track. The switch track is constructed primarily for the purpose of storing and moving cars thereon. To permit its use as a footpath greatly hampers the railroad company in moving its cars thereon, and it is not the policy of the law to encourage such use, and unless a clear right to be upon the switch track at a given place is shown, a footman thereon is to be regarded as a trespasser.

The Court instructs you, that there is no legal obligation imposed upon the defendant to fence its switch yard in the city of Seattle, and it is not negligence upon the part of the defendant in not fencing, where no duty is imposed upon the defendant to do so.

The Court instructs you, that sympathy has no place in the trial of a lawsuit; and in making up your minds as to what your verdict shall be, don't permit that element to enter into your deliberations whatsoever.

Logically, in taking up the issues that have been submitted to you for determination, you would first inquire and determine whether it has been shown

by a fair preponderance of the evidence that the deceased, was himself [127] guilty of contributory negligence, as I have defined that matter to you; and, if you find that the deceased was guilty of contributory negligence, and that that was the proximate cause of his injury and death, it would be your duty to return a verdict for the defendant, and it would not be necessary for you to inquire concerning the other issues. However, if you find that there is no fair preponderance of the evidence that the deceased was guilty of contributory negligence, then you would determine whether it has been shown by a fair preponderance of the evidence, that either of the deceased's parents had been guilty of contributory negligence, that is, negligence which had directly contributed to his injury and death. If you find that there was any such fair preponderance of the evidence, you would stop right there, and return a verdict for the defendant; because it would not be necessary for you to determine the other issues in the case. If there has been no fair preponderance of the evidence shown as to contributory negligence, either on the part of the deceased, or on the part of either of his parents, you would then take up the question and determine whether the defendant had, by a fair preponderance of the evidence, been shown to have been negligent in any of the particulars of which plaintiffs had complained in either action. If you find that there is a fair preponderance of the evidence that the defendant was guilty of such negligence, you would proceed; but if there has been no fair preponder-

ance of the evidence that the defendant company was guilty of such negligence you would stop there, and return a verdict for the defendant company. If it has been shown by a fair preponderance of the evidence that it was guilty of some [128] act of negligence of which complaint is made, you would then take up the question of whether that was the proximate cause of deceased's injury and death. If you find by a fair preponderance of the evidence that it was, you would then come to the last step in these two cases, which would be to fix the amount of recovery.

Now, in the one case, that is, where the administrator sues, the Court instructs the jury, if you find for the plaintiff, you will find for him for such sum of money if any, as you may find and believe from the evidence, under all the circumstances of the case to be just, bearing in mind that it is the pecuniary value—the value in money, of all benefits, which it is reasonably certain his parents would have received had he not been killed. —That is the measure and the amount of recovery in that case.

In the other case where the parents sue on account of pain and suffering of the deceased, the Court instructs you, that if you find for the plaintiffs, you will assess the damages at whatever sum you may find from the testimony to be a fair and reasonable compensation for the pain and suffering endured by Edgar Roman, because of the accident, between the time of the accident and the time of his death. In this action you can award nothing for his death; you can award

nothing for the losses caused to the parents by reason of his death; you can award nothing by way of punishment of the defendant because of its negligence, if you find it was negligent.

In this case, as in other cases, the questions of fact are submitted to the jury for their determination; and you are the sole and exclusive judges of every fact in the [129] case, and the weight of the evidence, and the credibility of the witnesses.

Is there anything further, Gentlemen?

* * * * *

Mr. JONES.—There was an instruction submitted on the deviation from the footpath, which I think was the law.”

The instruction referred to is as follows:

“The Court instructs you that if you find from the evidence that a footpath across defendant’s track No. 12 was acquired by user and that a person traveling on same across said track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon.”

“The COURT.—If a man is going along an unobstructed road, and climbs over a fence into another man’s field, he would be a trespasser, all right, but I do not think that requested instruction is applicable to this case.

Mr. JONES.—I would like the record to show an exception.

The COURT.—Exception allowed.

* * * * *

Mr. JONES.—If the Court please, I do not know that the jury understands that during the progress of the trial, the plaintiffs filed amended complaints, and that there has been no answers filed by the defendant to said complaints, but that all the material allegations of the complaints are denied.

The COURT.—(To the Jury.) The jury will so understand. And the Court in the instructions told you that the existence of a footpath was denied, knowledge on the part of [130] defendant that there was such footpath was denied, and negligence on the part of defendant was denied. You will consider all the material allegations, not admitted, as denied. You may retire.”

The jury then retired, and after deliberation returned into court with a verdict in favor of the plaintiff in cause No. 7019 for damages in the sum of One Thousand Dollars (\$1,000), and a verdict in favor of the plaintiffs in cause No. 7018 for damages in the sum of Four Thousand Dollars (\$4,000), said verdicts being returned on the 15th day of December, 1922.

And now in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in both cases, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant. [131]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN and ANNA J. ROMAN,

Plaintiffs,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Order Settling Bill of Exceptions.

United States of America,
Western District of Washington,
Northern Division,—ss.

On this 19th day of March, 1923, the above consolidated causes coming on to be heard upon the application of the defendant, Oregon-Washington Railroad & Navigation Company, to settle a bill of exceptions in said causes, the defendant Oregon-

Washington Railroad & Navigation Company appearing by its attorneys, Bogle, Merritt & Bogle and E. I. Jones, and the plaintiffs appearing by their attorneys, Fred C. Brown and J. Stanley Tyrrell; and it appearing to the Court that the bill of exceptions was duly served on the attorneys for the plaintiffs within the time provided by law, and that amendments thereto have been accepted and incorporated therein, and all the parties consenting to the signing and settling of the same, and that [132] the time for settling said bill of exceptions has not expired, the same having been extended from time to time by stipulation and order of the Court for the reason that more time was required; and it further appearing to the Court that the bill of exceptions contains all the material facts occurring in the trial of said causes together with the exceptions thereto, and all the material matters and things occurring upon the trial except the exhibits introduced in evidence, which are hereby made a part of the bill of exceptions, and the Clerk of the Court is hereby ordered and instructed to properly mark and identify such exhibits and attach the same thereto, or in case it is inconvenient or not practicable to attach said exhibits, to properly identify them in the causes and to forward them unattached, as part of the bill of exceptions;

Thereupon, on motion of the defendant, Oregon-Washington Railroad & Navigation Company, it is hereby ORDERED that said proposed bill of exceptions be and it is hereby settled as the true

bill of exceptions in said causes, and the same is hereby certified accordingly by the undersigned Judge of this court who presided at the trial of said causes, as a true, full and correct bill of exceptions, and the Clerk is hereby ordered to file the same as the record in said causes, and to transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,
Judge.

Copy of attached bill of exceptions received and due service thereof admitted upon January 22, 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiffs. [133]

[Indorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Feb. 16, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 27, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [134]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Stipulation Consolidating Causes for Appeal.

IT IS HEREBY STIPULATED AND
AGREED by and between the parties to the above-
entitled actions, through their respective attorneys,
Fred C. Brown and J. Stanley Tyrrell, attorneys
for the plaintiff, and Bogle, Merritt & Bogle and
E. I. Jones, attorneys for the defendant, that said
actions shall be and remain consolidated for all

purposes of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, just as they were consolidated for the purposes of trial in the above-entitled court, and that all assignments of error shall apply to each action, except as therein expressly stated as applying to only one of said actions.

Dated at Seattle, Washington, this 13th day of June, 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff. [135]
BOGLE, MERRITT & BOGLE,
E. I. JONES,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [136]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable EDWARD E. CUSHMAN,
Judge of the District Court aforesaid:

Now comes Oregon-Washington Railroad & Navigation Company, a corporation, the defendant in the above-entitled consolidated actions, by its attorneys, and respectfully shows that on the 15th day of December, A. D. 1922, a jury duly im-

panelled found a verdict of \$4,000 in cause No. 7018, and a verdict of \$1,000 in cause No. 7019, against your petitioner and in favor of the plaintiff in said respective causes, and upon said verdicts a final judgment was entered in cause No. 7018 on the 30th day of December, A. D. 1922, and in cause No. 7019 on the 20th day of February, A. D. 1923, against your petitioner, Oregon-Washington [137] Railroad & Navigation Company, defendant herein.

Your petitioner, feeling itself aggrieved by the said verdicts and judgments entered thereon as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Petitioner in Error.

Copy of attached petition for writ of error received and due service thereof admitted upon 13 June, 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [138]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Assignments of Error.

Now comes the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, plaintiff in error in the above-numbered and entitled causes, and in connection with its petition for a writ of error in said causes, assigns the following errors which plaintiff in error avers occurred on the trial thereof and on which it relies to reverse the judgments entered herein, as appears of record:

I.

The Court erred in overruling the demurrers to the complaints filed in these causes, and each of them, for the reason that the plaintiff in each action had no capacity to sue, that there was a defect in the parties plaintiff, and for the further reason that the complaint in each cause did not state a [139] cause of action against the defendant.

II.

The Court erred in permitting the witness W. H.

Barr, for plaintiff, to answer the following question propounded by plaintiff's attorney to him: "Did you have any knowledge that the public was using the path?" and in not sustaining the objection of the defendant thereto; said question and the testimony sought to be elicited was immaterial, for the reason that the witness—as shown by his testimony—had not worked for the defendant for four or five years previous to the accident upon which the said actions are based. The answer of the witness to the question above was "Yes, sir."

III.

The Court erred in not granting the motion of the defendant for a nonsuit for the following reasons:

(a) That there was a material variance between the complaints and the proof thereof, in that all the complaints alleged that at the time of the accident, "there were standing on said track No. 12 and commencing about 4 feet east of said path and extending eastward about 2,800 feet, some 57 cars belonging to the defendant corporation," when the evidence of the plaintiff conclusively showed that the last car in the string extended over said alleged path for a distance of almost its entire length.

(b) That the testimony did not show that said defendant company was guilty of any negligence sufficient to entitle the plaintiff to recover.

(c) That the plaintiff's evidence established that decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions,

which directly contributed thereto, [140] in attempting to cross the defendant's switch-track at the place where he was injured, there being on the track a car directly in front of him, so that he was obliged to walk westward almost the entire length of the car, and in then attempting to cross immediately at the very end of the car.

(d) That the plaintiff's evidence further established negligence on the part of the plaintiff and his wife, the parents of the decedent, which directly contributed to the injuries, in that when they accompanied the decedent and his brothers to the place of the accident on previous occasions, they ordered and permitted the decedent and the others to climb over and under the couplings between the cars, and on the occasion of the accident, they allowed the decedent to cross over the track at the place of the accident unaccompanied by them, or either of them, or at all.

IV.

The Court erred in not granting defendant's motion for a directed verdict:

(a) For the same reasons given in subdivision (a) of Assignment No. III.

(b) For the reason that the evidence was insufficient to justify the verdict against defendant.

(c) That the evidence did not show that the said defendant was guilty of any negligence sufficient to entitle the plaintiff to recover.

(d) That the evidence established that the decedent Edgar Roman's injuries were caused solely by his own negligent acts and omissions, which

directly contributed thereto, in attempting to cross the defendant's switch-track at the place where he was injured within the defendant's switch-yards, there [141] being at that time on said track a car directly in front of him, so that he was obliged to walk westward almost the entire length of said car, and in then attempting to cross immediately at the very end of said car, said car being at that time and place one of a long string of cars attached together, the eastward end not being visible to the decedent and his brother.

(e) The evidence further established without question negligence on the part of the plaintiff and his wife, the parents of the decedent, consequent beneficiaries under these actions, which negligence directly contributed to the injuries, in that when they accompanied the decedent and his brothers to the place of the accident on previous occasions, they ordered and permitted said boys to climb over and to crawl under the couplings between the cars, and on the occasion of the accident, they allowed the decedent and brother to go upon the switch-track unaccompanied by them, or either of them, or at all.

V.

The Court erred in refusing to give the instruction requested by the defendant which reads as follows:

“The Court instructs you that if you find from the evidence that a footpath across defendant's track No. 12 was acquired by user and that a person traveling on same across said

track was not a trespasser, you are further instructed that any material deviation from said footpath in crossing said track would constitute the party making such deviation in crossing said track a trespasser thereon”;

for the reason that such instruction was in accordance with the law and under the facts of the cases, and for the reason that the decedent departed so far from the alleged path as to make it a question for the jury to determine whether or not his status had been altered from a licensee to a trespasser. [142]

VI.

The Court erred in rendering and entering any judgment in favor of plaintiff and against the defendant in said causes, for the following reasons:

(a) That the plaintiff in said causes had no capacity to sue.

(b) That the filing of the second amended complaint in cause No. 7018, did not aid the verdict and judgment theretofore rendered and entered.

(c) That none of the complaints in said causes stated facts sufficient to entitle the plaintiff, or plaintiffs, to any judgment against the defendant.

(d) That the alleged cause of action in the amended complaint in cause No. 7018, is the same as set forth in the amended complaint in cause No. 7019.

WHEREFORE, said Oregon-Washington Railroad & Navigation Company, defendant, plaintiff in error herein, prays that the judgment of this Court in the above-entitled causes be reversed,

with directions to said District Court to enter judgment herein against the plaintiff, or plaintiffs, and in favor of the defendant.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant-Plaintiff in Error.

Copy of attached assignments of error received and due service thereof admitted upon June 13, 1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [143]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased;

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That Oregon-Washington Railroad & Navigation
Company, a corporation, as principal, and National
Surety Company, a corporation, as surety, are held
and firmly bound unto James Roman, administra-
tor of the estate of Edgar Roman, deceased, the
plaintiff herein, in the full and just sum of six
thousand dollars (\$6,000.00), to be paid to the said
plaintiff, for which payment, well and truly to be
made, we bind ourselves, our successors and as-
signs, jointly and severally, firmly by these pres-
ents.

Sealed with our seals and dated this 13th day of
June, 1923. [144]

WHEREAS, the above-named Oregon-Washing-
ton Railroad & Navigation Company, a corpora-
tion, has prosecuted a writ of error to reverse the
judgments of said District Court rendered on the
21st day of December, 1922, and on the 20th day of

February, 1923, in favor of said James Roman, administrator of the estate of Edgar Roman, deceased, and against said Oregon-Washington Railroad & Navigation Company, for the recovery of Four Thousand Dollars (\$4,000.00) and One Thousand Dollars (\$1,000.00);

NOW, THEREFORE, the condition of this obligation is such that if the above-named Oregon-Washington Railroad & Navigation Company, shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said appeal good, this obligation shall be void; otherwise same shall remain in full force and virtue.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY,

By W. H. BOGLE,
Its Agent and Attorney,
Principal.

NATIONAL SURETY COMPANY,

By C. B. WHITE.

[Seal]

Attest: J. GRANT,
Res. Ass. Sec.

The above bond is hereby approved as to sufficiency and form this 13th day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [145]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Order Allowing Writ of Error.

Upon motion of Bogle, Merritt & Bogle and E. I. Jones, attorneys for the defendant, plaintiff in error, and upon filing the petition for writ of error and assignments of error,—

IT IS ORDERED that the appeal by writ of error be and the same hereby is allowed by this

Court, and the clerk is directed to issue a writ of error in accordance with the usual rules and practice of the Court, and that said Oregon-Washington Railroad & Navigation Company, said plaintiff in error, be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, judgments heretofore entered herein, and that the amount of the bond on said [146] writ of error be and hereby is fixed at Six Thousand Dollars (\$6,000.00).

Dated at Seattle, Washington, this 13th day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [147]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Order Directing Forwarding of Original Exhibits.

On motion of Oregon-Washington Railroad & Navigation Company, a corporation, defendant herein (plaintiff in error) for an order requiring and directing the Clerk of this court to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, all of the exhibits admitted in evidence at the trial of the above-entitled causes, as a part of the return of said Clerk to the writ of error heretofore issued herein, it appearing to the satisfaction of the Court that said original exhibits should be returned to said Court of Appeals, and that said motion should be granted;

Now, therefore, it is HEREBY ORDERED that the Clerk of this court be, and he is hereby, authorized and directed to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit [148] all of the exhibits admitted in evidence at the trial of the above-entitled cause, as a part of the return to the writ of error heretofore

issued herein, as by law and the rules of court provided.

Dated June 22d, 1923.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 22, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [149]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

YOU WILL PLEASE prepare a transcript of record in the above-entitled consolidated causes, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error heretofore perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file; transcript to be prepared pursuant to the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and to be transmitted to the Clerk of said court at San Francisco, California, forthwith: [150]

1. Complaints.
2. Demurrers.
3. Order overruling demurrers and exceptions thereto (Journal, October 16, 1922).
4. Answers.
5. Replies.

6. Amended complaints.
7. Verdicts.
8. Judgments.
9. Second amended complaints.
10. Answers to second amended complaints.
11. All orders extending time for filing bill of exceptions.
12. Bill of exceptions.
13. Stipulation consolidating actions for appeal.
14. Order settling bill of exceptions.
15. Petition for writ of error.
16. Assignments of error.
17. Order allowing writ of error.
18. Writ of error.
19. Bond.
20. Citation.
21. All of the exhibits admitted in evidence at the trial of the above-entitled cases.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant-Plaintiff in Error.

We waive the provisions of the Act approved February 13, 1911, and ask that you forward type-written transcript to the Circuit Court of Appeals for printing, as provided under Rule 105 of this Court.

BOGLE, MERRITT & BOGLE,
E. I. JONES,

Attorneys for Defendant-Plaintiff in Error.

Copy of attached praecipe for transcript received
and due service thereof admitted upon 13 June,
1923.

FRED C. BROWN and
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Jun. 13, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [151]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 151, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing consolidated causes, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and [152] that the same constitute the record on return to writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges, incurred and paid in my office on behalf of the plaintiff in error for making record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 347 folios at 15¢.....	\$ 52.05
Certificate of Clerk to transcript of rec- ord, 4 folios at 15¢60
Seal to said certificate20
Certificate of Clerk to original exhibits, 3 folios at 15¢45
Seal to said certificate20

I hereby certify that the above costs for prepar-
ing and certifying record, amounting to \$53.50⁰, has
been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and here-
with transmit the original writ of error and the
original citation issued in these consolidated causes.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed the seal of said District Court,
at Seattle, in said District, this 28th day of June,
1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [153]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honor-
able Judge of the District Court of the United
States for the Western District of Washing-
ton, Northern Division, GREETING:

Because in the record and proceedings, as also
in the rendition of the judgments of the pleas

which are in the said District Court before you between James Roman, administrator of the estate of Edgar Roman, deceased, plaintiff, defendant in error, and Oregon-Washington Railroad & Navigation Company, a corporation, defendant, plaintiff in error, a manifest error has happened to the damage of Oregon-Washington Railroad & Navigation Company, plaintiff in error, as by said complaints appear, and we being willing that error, if any hath [154] been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgments be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States this the 13th day of June, A. D. 1923.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the
Western District of Washington, Northern
Division.

Allowed this the 13th day of June, A. D. 1923.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the
Western District of Washington, Northern
Division. [155]

Copy of attached writ of error received and due
service thereof admitted upon June 13, 1923.

FRED C. BROWN,

J. STANLEY TYRRELL,

Attorneys for Plaintiff-Defendant in Error.

Filed in the United States District Court, West-
ern District of Washington, Northern Division.
Jun. 13, 1923. F. M. Harshberger, Clerk. By
S. E. Leitch, Deputy. [155½]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7018.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

CONSOLIDATED.

No. 7019.

JAMES ROMAN, Administrator of the Estate of
Edgar Roman, Deceased,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America: To the Plaintiff, James
Roman, Administrator of the Estate of Edgar
Roman, Deceased, and to His Attorneys, Fred
C. Brown and J. Stanley Tyrrell, GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear at the United States Cir-
cuit Court of Appeals for the Ninth Circuit, within
thirty (30) days from the date hereof, pursuant
to a writ of error filed in the Clerk's office of the
United States District Court for the Western Dis-
trict of Washington, Northern Division, wherein
the Oregon-Washington Railroad & Navigation
Company, a corporation, is the plaintiff in error,
and you are defendant in error, and show cause,
if any there be, why the judgments rendered
against the said plaintiff in error, as in said writ of
error mentioned, should not be corrected, and
[156] speedy justice should not be done to the
parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, Northern Division.

Dated this 13th day of June, A. D. 1923.

EDWARD E. CUSHMAN,
Judge. [157]

Copy of attached citation received and due service thereof admitted upon June 13, 1923.

FRED C. BROWN,
J. STANLEY TYRRELL,
Attorneys for Plaintiff-Defendant in Error.

Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 13, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4049. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. James Roman, Administrator of the Estate of Edgar Roman, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 2, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.